No. 17325

United States
Court of Appeals
for the Ninth Circuit

GEORGE FLEUTI,

Appellant,

vs.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HIRAM W. KWAN,
425 Bernard Street,
Los Angeles 12, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney,

DONALD A. FAREED,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

United States District Court
Southern District of California
Central Division
No. 1275-59K

GEORGE E. M. FLEUTI,

Plaintiff,

vs.

RICHARD C. HOY, DISTRICT DIRECTOR UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND REVIEW OF ADMINISTRATIVE ACTION.

Comes now George E. M. Fleuti, plaintiff above named and for cause of action alleges:

I

That this United States District Court has jurisdiction over the subject matter of this action by virtue of the provisions of Title 8, United States Code Annotated, Sec. 1329 and Title 28, United States Code Annotated Sect. 2201 through 2202, and Title 5, United States Code Annotated Sect. 1009.

II

That the plaintiff, George E. M. Fleuti resides within the territorial jurisdiction of the Central Division of the United States District Court for the Southern District of California.

III

That the defendant, Richard C. Hoy is the District Director of the Immigration and Naturalization Service, 16th District within the southwest region at Los Angeles, California and as such is the official vested with authority to execute orders and warrants of deportation and to stay and execute.

IV

Defendant has issued or will cause to be issued a final order of deportation ordering plaintiff to be deported from the United States. That the defendant is vested with authority to stay the execution of said order and warrant of deportation.

V

Plaintiff, George E. M. Fleuti is a 47-year old native and citizen of Switzerland and has resided continuously within the United States of America as a permanent resident since his admission on October 9, 1952.

VI

That on or about September 22, 1959 an order of deportation was issued after a hearing before the United States Department of Justice Special Inquiry Officer in Los Angeles, California ordering plaintiff to be deported from the United States pursuant to the provisions of Section 241 (a)(1) of the Immigration & Nationality Act on the ground that plaintiff was subject to deportation at the time of his entry for the alleged reason that he was within one or more of the classes of aliens excludable by law existing at the time of such entry, to wit, aliens afflicted with Psychopathic personality under Sect. 212 (a) (4) of the Immigration

& Nationality Act, Title 8, United States Code, Annotated Sect. 1101 et seq.

VII

That plaintiff prior to said order of deportation was accorded a hearing on the above mentioned charge and in the course of the said hearing plaintiff denied and has at all times denied that he is a person afflicted with Psychopathic personality. In the course of the aforesaid hearing, plaintiff caused to be offered a medical report of David R. M. Harvey, M.D., which said report negatives the findings of Psychopathic personality and a copy of the final report is attached hereto and marked Exhibit "A" and made a part hereof by reference.

VIII

That as a result of said hearing plaintiff was determined to be deportable and or order of deportation was issued thereto. That the said order of deportation is invalid by virtue of the fact that it is not based upon reasonable, substantial and probative evidence.

IX

Plaintiff appealed the finding and order of deportation to the Board of Immigration Appeals and the Board of Immigration Appeals dismissed plaintiff's appeal on November 20, 1959.

X

Plaintiff has exhausted his administrative remedies and this complaint is filed upon a final order of deportation and defendant is proceeding to execute said order and warrant of deportation deporting plaintiff from the United States.

Wherefore, plaintiff prays that a temporary restraining order be issued enjoining defendant and his agents from executing the order of deporatation and warrant of deportation pending the determination of this proceeding, that a permanent injunction be granted restraining and enjoining the defendant from executing the said order and warrant of deportation and that a declaratory judgment be issued declaring the said order and warrant of deportation of plaintiff, null, void and unenforceable and for such other relief as may be proper in the premises.

/s/ HIRAM W. KWAN,
Attorney for Plaintiff.

EXHIBIT "A"

Aug. 10, 1959

Richard F. Porter, Esq.
Attorney at Law,
202 North Hawthorne,
Hawthorne,
California.

Re: Mr. George Fleuti,
305 North Montgomery,
Ojai.

Dear Mr. Porter:

Your client, Mr. Fleuti, was first examined by me on May 20, 1959, and he has since been re-examined on June 22, July 8, and Aug. 7, 1959, in order to determine the extent of his psychiatric problem and to evaluate his real motivation for treatment and control of his

interest in homosexuality as an outlet for his sexual and social needs.

This patient has been twice convicted of seeking homosexual contact. The circumstances in each case have indicated an interest in adult males who have similar interest. The circumstances of his arrests suggest entrapment, but I do not consider this an important item since Mr. Fleuti tells me that he has recognized homosexual interests for many years, since his youth. His first homosexual experience was at 26. However his socio-economic relationships have been consistently good according to my history. He was never arrested in his country of origin nor has there been any other difficulty in the U.S.A. He does not frequent homosexual hang-outs, has no evident interest in youths, manifests no irresponsible trends, and has his main social contacts with respected members of the community. It is my understanding that his work history—particularly in this country—is quite satisfactory.

The mental status examination of this patient is as follows: the patient is cooperative, freely relates his history, and makes no effort to minimize the problem. He is a lonely man and the main focus of his life is his work. There is a moderate elevation of anxiety, but no other psychiatric findings are present other than the trend toward homosexual outlet. Reality contact and the sense of social responsibil are intact.

His sexual drive—particularly at his age—is thought to be within his range of control, especially if he is under the supervision of continuing contact with a psychiatrist.

The diagnosis in this case is that of a mild mannered man with a good socio-economic adjustment who has from time to time sought sexual outlets with others who indicated a like interest. His deviation is not sufficient to justify the diagnosis of psychopathic personality. However, the formal label would be that of: Sexual deviation, homosexuality, now under control. During my several examinations of this patient I have concluded that his arrests have had a good effect on his homosexual trend control and that my repeated examinations have also heightened his sense of sexual control/and lessened his interest.

The California Code regarding Sexual Psychopaths requires that the person ". . . predisposed to the commission of sexual offenses . . . be so . . ." ". . . in a degree constituting him a menace to the health or safety of others. . . ." I do no find that Mr. Fleuti is a danger to any other person. In many ways he seems to have traits of a better than average citizen, in the sense of hard work, general morality, and honesty. I found no effort on his part to misrepresent the circumstances of his difficulty.

I do not think that another psychiatrist with adequate training and experience will be likely to disagree with my findings.

Very truly yours,

/s/ DAVID R. M. HARVEY, M.D.
Diplomate, American Board of
Psychiatry & Neurology.

DH jg

Vita

Yale University, B.S., Class of 1943

Tulane University School of Medicine, M.D., Class of 1947

Rotating Internship, Cottage Hospital, Santa Barbara, '47-'48

Resident Psychiatrist, Pilgrim State Hospital, West Brentwood, Long Island, N.Y., '48-'49

Resident Psychiatrist, University of Iowa Psychopathic Hospital and Clinic, '49-'51

Post Graduate Course in Psychiatry, New York Psychiatric Institute, Columbia University Medical School, '48-'49

University of Iowa Graduate School (Psychiatry), '49-'51

Staff Psychiatrist, Seattle V. A. Hospital, '51

Instructor in Psychiatry, University of Washington, School of Medicine, '51

Psychiatrist, Riverside California State Mental Hygiene Clinic, '51-'52 Director, '52-'53

Private psychiatric practice, '53 to date

Consulting Staff, St. John's Hospital, Oxnard

Consulting Staff, Foster Hospital, Ventura

Chief, Psychiatric Division, Ventura County General Hospital

Chairman, Ventura County Advisory Committee on Mental Health

Member: American Medical Assn., California State Medical Assn., Ventura County Medical Assn., American Association for the Advancement of Science, Western Electroencephalographic Assn., American Psychiatric Assn.

Diplomate Certified in Psychiatry by the American Board of Psychiatry & Neurology

[Endorsed]: Filed Dec. 9, 1959.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

George K. Rosenberg, successor to the defendant above named, by and through the undersigned, in answer to the Complaint on file herein admits, denies, and alleges as follows:

I

Neither admits nor denies the allegations contained in paragraph I on the ground that said allegations are conclusions of law.

II

Admits the allegations contained in paragraph II.

III

Admits the allegations contained in paragraph III, except that George K. Rosenberg is now the Acting District Director, Immigration & Naturalization Service, Los Angeles, California, having succeeded Richard C. Hoy.

IV

Admits the allegations contained in paragraph IV.

V

Answering paragraph V, defendant admits that plaintiff, George E. M. Fleuti is a 47 year old native and citizen of Switzerland, but denies the remaining allegations of paragraph V. Defendant alleges instead that

plaintiff has resided continuously within the United States of America as a permanent resident since his admission on October 9, 1952 except for a one day visit to Ensenada, Mexico, in August of 1956.

VI

Answering paragraph VI, defendant admits that on or about September 22, 1959, an order of deportation was issued after a hearing before the United States Department of Justice Special Inquiry Officer in Los Angeles, California, ordering plaintiff to be deported from the United States pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act, but denies the remaining allegations contained in paragraph VI. Defendant alleges instead that the aforementioned Special Inquiry Officer concluded that plaintiff is subject to deportation on the ground that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to-wit, aliens afflicted with Psycopathic Personality, under Section 212(a)(4) of the Act.

VII

Answering paragraph VII, defendant admits that plaintiff prior to said order of deportation was accorded a hearing on the above mentioned charge, that in the course of the aforesaid hearing plaintiff caused to be offered a medical report of David R. M. Harvey M.D., and that a copy of the final report is attached to the complaint herein and marked Exhibit "A" and made a part thereof by reference. Except as expressly admitted herein defendant denies the remaining allegations contained in paragraph VII on the ground that said allegations are conclusions of law.

VIII

Answering paragraph VIII, defendant admits that as a result of said hearing plaintiff was determined to be deportable and that an order of deportation was entered. Except as expressly admitted herein defendant denies the remaining allegations contained in paragraph VIII.

IX

Admits the allegations contained in paragraph IX.

X

Answering paragraph X defendant admits that at the time the complaint herein was filed the allegations of said paragraph were true; however, defendant alleges that no action will be taken to deport plaintiff from the United States until the present judicial proceedings are terminated.

For a Further, Separate, and First Affirmative Defense to Said Complaint, Defendant Alleges:

I

The plaintiff herein has been accorded a full and fair hearing in conformity with law to determine his right to be and remain in the United States. There will be offered in evidence when this matter comes on for hearing a certified record of the Immigration and Naturalization Service, Department of Justice, containing the complete record of the deportation proceedings relating to the plaintiff.

For a Further, Separate, and Second Affirmative Defense to Said Complaint, Defendant Alleges:

I

The complaint on file herein fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said complaint, denying the relief prayed for therein, and for such other relief as to the Court seems just and proper in the premises.

Dated: January 21, 1960.

LAUGHLIN E. WATERS,
United States Attorney.

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division.

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 21, 1960.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE ORDER

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It is Ordered:

I.

This is an action for judicial review of an Order of Deportation outstanding against the plaintiff.

II.

Federal jurisdiction is invoked upon the ground that there is a final Order of Deportation outstanding against the plaintiff, issued by a Special Inquiry Officer of the Immigration and Naturalization Service on September 22, 1959, review of which is authorized by Section 10 of the Act of June 11, 1946 (Administrative Procedure Act), 60 Stat. 243, 5 U. S. C. A. §1009.

III.

The following facts are admitted and require no proof:

A. Plaintiff, George E. M. Fleuti, is an alien, a native and citizen of Switzerland. He was admitted to the United States for permanent residence at Rouses Point, New York, on October 9, 1952. He last entered the United States at San Ysidro, California, during August, 1956 as a returning resident alien after a visit of a few hours to Ensenada, Mexico.

B. The plaintiff resides within the territorial jurisdiction of the Central Division of the United States District Court for the Southern District of California.

C. George K. Rosenberg is the District Director, Immigration and Naturalization Service, Los Angeles, California, and as such is an official vested with authority to execute orders and warrants of deportation. It is stipulated and agreed that George K. Rosenberg may be substituted as a party defendant in this action in the place and stead of Richard C. Hoy.

D. On September 22, 1959 an Order of Deportation was issued, after a hearing, by a Special Inquiry Officer

of the Immigration and Naturalization Service, ordering that plaintiff be deported from the United States pursuant to the provisions of Section 241 (a) (1) of the Immigration and Nationality Act on the ground that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens afflicted with Psychopathic Personality, under Section 212 (a) (4) of the Act.

E. Plaintiff appealed the order of the Special Inquiry Officer to the Board of Immigration Appeals, United States Department of Justice, and on November 20, 1959 said Board dismissed plaintiff's appeal.

IV.

The reservations as to the facts recited in paragraph III above are as follows: None.

V.

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary: None.

VI.

The following issues of fact, and no others, remain to be litigated upon the trial:

1. Is the Order of Deportation outstanding against the plaintiff based upon reasonable, substantial and probative evidence (the defendant contends that this is an issue of law, at least to the extent that no evidence not received during deportation proceedings is admissible before this Court)?

VII.

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

A. Plaintiff's exhibits:

1. Up-to-date report of medical examination of plaintiff to be made prior to trial by David R. M. Harvey, M.D.

B. Admissions and Issues Relating to plaintiff's exhibits:

1. Defendant contends that plaintiff's Exhibit 1 listed above is not admissible in evidence in these proceedings.

C. Defendant's exhibits:

1. Authenticated record of the Immigration and Naturalization Service relating to plaintiff, File No. A 8 382 428.

D. Admissions Concerning Defendant's Exhibit:

1. It is stipulated and agreed that the exhibit of the defendant listed above may be received in evidence without objection.

VIII.

The following issues of law, and no others, remain to be litigated upon the trial:

1. Is the Order of Deportation outstanding against the plaintiff based upon reasonable, substantial, and probative evidence?

2. Were the deportation proceedings relating to plaintiff fair and in accordance with law?

3. May this Court receive evidence which was not a part of the deportation proceedings?

4. Is plaintiff's Exhibit 1 listed in Part VII A above, admissible in evidence in these proceedings?

5. Is Section 212(a)(4) of the Immigration and Nationality Act unconstitutional as being vague and ambiguous?

IX.

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this Order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: This 7th day of Nov., 1960.

/s/ JAMES M. CARTER
United States District Judge

Approved as to Form and Content

/s/ HIRAM W. KWAN
Attorney for Plaintiff

/s/ JAMES R. DOOLEY
Assistant U. S. Attorney
Attorney for Defendant.

[Endorsed]: Filed Nov. 7, 1960.

[Title of District Court and Cause.]

STIPULATION FOR ADMISSION OF IMMIGRATION RECORD IN EVIDENCE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND FOR RE-SUBMISSION OF MOTION FOR DECISION AND ORDER THEREON.

Whereas, on December 8, 1960 the Court denied defendant's Motion for Summary Judgment "without prejudice, subject to being renewed by attaching thereto the authenticated record of the Immigration and Naturalization Service relating to the plaintiff"; and

Whereas, the aforementioned authenticated record of the Immigration and Naturalization Service relating to the plaintiff has heretofore been lodged with the Court pursuant to Rule 9 (f) Local Rules, Southern District of California;

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the said authenticated record of the Immigration and Naturalization Service relating to the plaintiff, heretofore lodged with the Court, may be deemed admitted in evidence in support of defendant's Motion for Summary Judgment filed herein on September 16, 1960, and that said motion may be deemed re-submitted to the Court for decision.

Dated: This 13th day of December, 1960.

/s/ HIRAM W. KWAN,
Attorney for Plaintiff.
LAUGHLIN E. WATERS,
United States Attorney.
DONALD A. FAREED,
Assistant U. S. Attorney,
Chief of Civil Division.
/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant.

It Is So Ordered:

This 20th day of December, 1960.

/s/ FRED KUNZEL,
United States District Judge.

12-21-60—

Record of Immigration & Natlzn Service marked as Defts. Exhibit A to the motion, & in evidence.

L B Figg
Deputy Clerk.

[Endorsed]: Filed Dec. 21, 1960.

[Title of District Court and Cause.]

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In ruling upon defendant's Motion for Summary Judgment, in addition to considering all of the documents in the Court file, including a report of plaintiff's doctor which the Court considers to be merely cumulative, the Court had submitted to it by stipulation the

authenticated copy of the file of the Immigration and Naturalization Service relating to the plaintiff.

The plaintiff first entered the United States as an alien in October of 1952, and in August of 1956 re-entered the United States at San Ysidro, California, after a day's trip to Ensenada, Mexico. In April of 1959, the Immigration and Naturalization Service served upon the plaintiff an Order to Show Cause why he should not be deported by reason of having been convicted of a crime involving moral turpitude. Subsequently there was lodged in the proceeding a charge that the plaintiff was excludable at the time of entry (1956) under Sec. 212(a)(4) of the Immigration and Nationality Act, 8 U. S. C. A., Sec. 1182(a)(4), as a person afflicted with psychopathic personality. There appears in the file, as Exhibit 2, a certified copy of the Minutes of the Superior Court of the State of California showing that defendant pleaded guilty to violation of Sec. 288a of the Penal Code of California, the date of the offense being February 16, 1956; also a sworn statement of the plaintiff (Exhibit 6) wherein he admitted having been a sexual deviate for some time prior to his original entry into the United States; also (Exhibit 5) a report by a doctor of the United States Public Health Service who classified the plaintiff as a psychopathic personality. This certainly constitutes ample evidence to support a finding by the Service that plaintiff at the time of his entry was a sexual deviate, classifiable as a person afflicted with a psychopathic personality.

The plaintiff's principal contention is that the term "psychopathic personality" is so vague and indefinite

as to render the statute invalid and unconstitutional. While it may be true that if the term be so used in a criminal statute that such statute would be held to be unconstitutional, however, here the statute is not a criminal statute but defines aliens who are to be excluded from the United States. There is no question but that Congress can determine what persons should be excluded and for whatever causes. Here, from the legislative history, it is clear that Congress intended that sexual deviates would be classified by the enforcing agencies as psychopathic personalities. See footnotes in the case of United States v. Flores-Rodriguez, 237 F. 2d 405, at pp. 412-413.

Inasmuch as there does not appear to be any genuine issue as to any material fact, defendant's Motion for Summary Judgment is hereby granted. Findings of fact and conclusions of law are to be submitted in accordance with the above.

Dated: This 4th day of January, 1961.

/s/ JAMES M. CARTER,
United States District Judge.

Copies to:
Hiram W. Kwan, Esq.
425 Bernard Street,
Los Angeles 12, California.

Laughlin E. Waters,
United States Attorney,
James R. Dooley, Esq.
Asst. U. S. Attorney,
Federal Building,
Los Angeles 12, California.

[Endorsed]: Filed Jan. 9, 1961.

United States District Court
Southern District of California
Central Division

No. 1275-59 K Civil

GEORGE E. M. FLEUTI,

Plaintiff,

vs.

GEORGE K. ROSENBERG, District Director, Immigration and Naturalization Service, Los Angeles, California,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The defendant's motion for summary judgment having been submitted to the Court for decision, the parties hereto having stipulated that an authenticated record of the Immigration and Naturalization Service relating to the plaintiff might be deemed admitted in evidence in support of said motion; and the Court having reviewed and considered said record of the Immigration and Naturalization Service relating to the plaintiff; and the Court having reviewed and considered all of the documents in the Court file, and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiff, George E. M. Fleuti, is an alien, a native and citizen of Switzerland. He was admitted to the United States for permanent residence at Rouses Point,

New York, on October 9, 1952. He last entered the United States at San Ysidro, California, during August, 1956 as a returning resident alien after a temporary visit to Mexico.

II.

On September 22, 1959, an order of Deportation was issued, after a hearing, by a Special Inquiry Officer of the Immigration and Naturalization Service, ordering that plaintiff be deported from the United States pursuant to the provisions of Section 241(a) (1) of the Immigration and Nationality Act on the ground that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to-wit, aliens afflicted with Psychopathic Personality, under Section 212 (a) (4) of the Act.

III.

Plaintiff appealed the aforementioned order of the Special Inquiry Officer to the Board of Immigration Appeals, United States Department of Justice; and on November 20, 1959 said Board dismissed plaintiff's appeal.

IV.

The record of the deportation proceedings relating to the plaintiff contains reasonable, substantial and probative evidence that plaintiff, at the time of his last entry during August, 1956, was within one or more of the classes of aliens excludable by the law existing at the time of such entry to wit: aliens afflicted with psychopathic personality under Section 212 (a) (4) of the Immigration and Nationality Act.

V.

The order of deportation outstanding against the plaintiff is based upon reasonable, substantial, and probative evidence.

VI.

The deportation proceeding relating to the plaintiff were fair and were in accordance with law.

Conclusions of Law

I.

This Court has jurisdiction of the within action under the provisions of Section 10 of the Act of June 11, 1946 (Administrative Procedure Act), 60 Stat. 243, 5 U. S. C. A. §1009.

II.

The record of the deportation proceedings relating to the plaintiff contains reasonable, substantial and probative evidence that plaintiff, at the time of his last entry during August, 1950, was within one or more of the classes of aliens excludable by the law existing at the time of such entry; to wit: aliens afflicted with psychopathic personality under Section 212 (a) (4) of the Immigration and Nationality Act.

III.

The order of deportation outstanding against the plaintiff is based upon reasonable, substantial, and probative evidence.

IV.

The deportation proceedings relating to the plaintiff were fair and were in accordance with law.

V.

Section 212 (a) (4) of the Immigration and Nationality Act, 66 Stat. 182, 8 USCA §1182 (a) (4) is

not unconstitutional as being vague or ambiguous, either on its face or as applied to the plaintiff herein.

VI.

The order of deportation outstanding against the plaintiff is valid, and plaintiff is deportable pursuant to said order.

VII.

There is no genuine issue as to any material fact in the instant case, and the defendant is entitled to summary judgment as a matter of law.

VIII.

Judgment should be entered in favor of the defendant and against the plaintiff, denying the relief prayed for in plaintiff's Complaint and awarding to the defendant his costs and disbursements incurred herein.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

1. That judgment be, and the same is hereby entered in favor of the defendant and against the plaintiff, denying the relief prayed for in plaintiff's Complaint.

2. That the defendant have his costs and disbursements incurred herein.

Dated: This 20 day of January, 1961.

Costs taxed $20.00.

/s/ JAMES M. CARTER,
United States District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Lodged Jan. 13, 1961. Filed and Entered Jan. 30, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is Hereby Given that plaintiff George E. M. Fleuti hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on January 30, 1961.

/s/ HIRAM W. KWAN
Attorney for Plaintiff

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 27, 1961.

[Title of District Court and Cause.]

Civil No. 1275-59 K

EX PARTE MOTION AND ORDER TO EXTEND TIME FOR FILING RECORD AND DOCKETING APPEAL

Plaintiff George E. M. Fleuti, hereby moves the Court for an extension of time to file the record and to docket the appeal of the above entitled case to May 29, 1961. That this additional period of time is necessary to complete the records and files in this matter on appeal to the United States Court of Appeals for the Ninth Circuit.

/s/ HIRAM W. KWAN
Attorney for Plaintiff

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 29, 1961.

[Title of District Court and Cause.]

Civil No. 1275-59 K

ORDER EXTENDING TIME FOR DOCKETING APPEAL

On application of plaintiff George E. M. Fleuti ex parte, the Court being fully advised, it is ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit and for docketing therein the appeal taken by notice of appeal filed February 27, 1961, is extended to May 28, 1961, pursuant to Rule 73(g) of the Federal Rules of Procedure.

Dated: March 29, 1961.

/s/ FRED KUNZEL,
United States District Court Judge

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 29, 1961.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

Page:

1 Names and Addresses of Attorneys

2 Complaint, filed 12/9/59

8 Answer to Complaint, filed 1/21/60
13 Pre-Trial Conference Order, filed 11/7/60
17 Stipulation for admission of Immigration Record in evidence in support of Motion for Summary Judgment and for re-submission of motion for decision and Order thereon, filed 12/21/60
19 Order granting Defendant's Motion for Summary Judgment, filed 1/9/61
22 Findings of Fact, Conclusions of Law and Judgment, filed and entered 1/30/61
27 Notice of Appeal, filed 2/27/61
29 Designation of record on appeal, filed 3/29/61
31 Statement of Points on appeal, filed 3/29/61
33 Ex Parte Motion and Order to extend time for filing record and docketing appeal, filed 3/29/61
35 Order extending time for docketing appeal, filed 3/29/61
37 Counter-Designation of record on appeal, filed 3/29/61
Defendant's Exhibit "A"

Dated: April 4, 1961.

[Seal]

JOHN A. CHILDRESS,
Clerk.

/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 17325. United States Court of Appeals for the Ninth Circuit. George Fleuti, appellant, vs. George K. Rosenberg, District Director of Immigration & Naturalization Service, Los Angeles, California, Appellee. Transcript of Record. Appeal from

the United States District Court for the Southern District of California, Central Division.

Filed: April 5, 1961.

Docketed: April 14, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States District Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Case No. 17325 Undocketed

GEORGE E. M. FLEUTI,

Appellant,

vs.

GEORGE K. ROSENBERG, District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

STATEMENT OF POINTS ON APPEAL

Appellant hereby presents the points upon which he claims the District Court erred:

1. That the Order of Deportation is without substantial probative, or reasonable evidence;

2. That Section 212(a)(4) of the Immigration and Nationality Act was unconstitutional as being vague and ambiguous.

/s/ HIRAM W. KWAN,
Attorney for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 12, 1961. Frank H. Schmid, Clerk.

30

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

Los Angeles 13, California

File No. A-8 382 428

IN THE MATTER OF GEORGE ERNST MARCEL FLEUTI

HEARING IN DEPORTATION PROCEEDINGS

Place: Los Angeles, California.

Date: April 14, 1959.

Persons present: Special Inquiry Officer: Bert F. Kearney. Examining Officer: Richard L. Lay. Stenographer: Edythe D. Marusa. Respondent: George Ernst Marcel Fleuti.

Hearing conducted in the English language.

SPECIAL INQUIRY OFFICER (Hereinafter designated as INQUIRY OFFICER) TO RESPONDENT:

Q. Do you speak and understand the English language?

A. Yes, I do.

Q. I have here an Order to Show Cause in the matter of George Ernst Marcel Fleuti, which I will show to you and ask you to inspect it and ask you if you are the person named in this order, as the respondent, and if you have been furnished with a copy of it?

A. Yes, I have a copy here.

Q. It is alleged in this order, that you are in the United States in violation of law, in that:

(1) You are not a citizen or national of the United States;

(2) You are a native and national of Switzerland;

(3) You last entered the United States at San Ysidro, California, during August, 1956;

(4) You were then admitted as a returning resident alien;

(5) You were convicted in the Superior Court of the State of California, in and for the County of Los Angeles, for sex perversion, in violation of Section 288a, Penal Code of California, on March 9, 1956.

Do you understand these allegations?

A. Yes.

31 Q. It is also charged in the order, you are subject to deportation from the United States, pursuant to the provisions of Section 241(a) of the Immigration and Nationality Act, in that at the time of entry, you were within one or more of the classes of aliens excludable by law existing at the time of such entry, to wit, aliens having been convicted of a crime involving moral turpitude, under Section 212(a)(9) of the Act: Sex Perversion.

Any alien, who at the time of his entry into the United States, is an alien who has previously been convicted of any crime involving moral turpitude, is not admissible to the United States, and if such alien enters, being excludable at the time of entry, may become thereafter subject to deportation.

The conviction in your case in the charge is for sex perversion. Do you understand this charge?

A. Yes.

Q. This proceeding, today, is a hearing, the nature and purpose of which, is to determine your deportability from the United States on this charge set forth in the order. You have the right to be represented in this proceeding by an attorney or other counsel or representative, authorized to practice before the Immigration and Naturalization Service. If you wish to be represented, such representation must be of your own choice and without any expense to the Government. Have you retained or employed anyone to represent you in this proceeding, or do you intend to do so?

A. I intend to do so.

Q. Have you made arrangements for anyone to represent you?

A. Not yet, no.

Q. When you received your copy of this Order to Show Cause did you read it?

A. I read it all, yes.

Q. You were informed by a notice on the back of this Order to Show Cause, that you might be represented in this proceeding by counsel. Why didn't you make arrangements to be represented, if you wish to have someone represent you?

A. The main reason, I didn't want anybody to know about my case if possible.

Q. But, you do wish to be represented?

A. Well, second, I live in Ojai, and I had to contact someone here in Los Angeles.

32 Q. Do you wish to be represented by a local attorney?

A. Yes, I think it is much easier for me and for him.

Q. The hearing will be adjourned at this time until Thursday, April 16, 1959, at 9:00 A.M. in order to give you an opportunity to arrange for counsel to represent you in this proceeding. You are informed that this is the only continuance that will be granted to you for this purpose, and if you appear on that date without counsel, we will proceed with the hearing regardless, unless you have some good and sufficient reason for not having obtained counsel. Do you understand?

A. Yes, I understand.

SPECIAL INQUIRY OFFICER. Have the record show that respondent is furnished with Form I293.

HEARING CONTINUED

I certify: That to the best of my knowledge and belief, the foregoing transcript is a true and correct report of everything that was stated during the course of the hearing, excluding statements made off the record:

Edythe D. Marusa.
EDYTHE D. MARUSA,
Stenographer.

33 UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File: A-8 382 428

MATTER OF GEORGE ERNST MARCEL FLEUTI, RESPONDENT
IN DEPORTATION PROCEEDINGS—TRANSCRIPT OF HEARING

Hearing held on April 20, 1959, at Los Angeles, California, before Special Inquiry Officer Bert F. Kearney. Recorded by Edythe D. Marusa, Stenographer. Language, English. Official Interpreter ..... Other Interpreter .....

APPEARANCES

On behalf of Service: ..... Examining Officer.
On behalf of Respondent: Richard F. Porter, Esquire, Attorney at Law, 202 N. Hawthorne Blvd., Hawthorne, California.

Form I-297.
(4-1-59.)

34 SPECIAL INQUIRY OFFICER TO RESPONDENT:

Q. Please stand and raise your right hand. Do you solemnly swear the testimony you give will be the truth, the whole truth and nothing but the truth; So Help You God?

A. Yes, I do.

Q. What is your name?

A. George Ernst Marcel Fleuti.

Q. The hearing in your case was adjourned on April 14, 1959 for the purpose of affording you an opportunity to arrange for a counsel to represent you in these proceedings. Have you retained Attorney Porter to represent you in this proceeding?

A. Yes.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Are you ready to proceed, Mr. Porter?

COUNSEL:

Yes, sir, we are. This man, Mr. Fleuti is agreeable to admit the allegations contained in the Order to Show Cause.

SPECIAL INQUIRY OFFICER:

I will take them up one by one.

SPECIAL INQUIRY OFFICER TO RESPONDENT AND COUNSEL:

Q. During this proceeding, you will be given every reasonable opportunity to inspect and examine any and all of the evidence presented. Should any witnesses be presented, you have the right to question such witnesses regarding any of their testimony, to cross-examine them, to make objections to the introduction in this record of any evidence or testimony of any witnesses, and to present any evidence or any witnesses in your own behalf; is that understood?

COUNSEL:

Yes, sir; he does.

35 SPECIAL INQUIRY OFFICER TO COUNSEL:

Mr. Porter, have you familiarized yourself with the Order to Show Cause in this proceeding?

COUNSEL:

Yes, sir, I have.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Does the respondent admit or deny the truth of allegation #1?

COUNSEL:

He admits that allegation, Sir.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Does respondent admit or deny the truth of allegation #2?

COUNSEL:

He admits that allegation, also.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Does respondent admit or deny the truth of allegation #3?

COUNSEL:

He also admits that, sir.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Does respondent admit or deny the truth of allegation #4?

COUNSEL:

He also admits that.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Does respondent admit or deny the truth of allegation #5?

COUNSEL:

And, admits that.

36 SPECIAL INQUIRY OFFICER TO COUNSEL:

Does the respondent admit or deny he is subject to deportation from the United States on the charge set forth in the Order?

COUNSEL:

Yes, he admits it.

SPECIAL INQUIRY OFFICER TO RESPONDENT:

Q. Mr. Fleuti, if you are ordered deported from the United States, what country do you designate as the country to which you shall be deported?

A. I want to go back to Switzerland.

Q. How old are you?

A. Forty-seven.

Q. Are your parents living?

A. No.

Q. In what country were your parents born?

A. In Switzerland.

Q. Was either of your parents ever in the United States?

A. No.

Q. Are you married?

A. No, sir.

Q. Have you ever been married?

A. No, sir.

Q. Do you have any close family relatives in the United States?

A. Yes, I do.

Q. What relatives do you have here?

A. An uncle and an aunt.

Q. Where are they?

A. In New Jersey.

Q. What is their status in this country; by that I mean, are they lawful permanent residents here or citizens of the United States?

A. They are citizens of the United States.

37 Q. Do you know how they acquired citizenship?

A. I don't know; the only thing I know, my uncle came about 55 years ago or something like that; I think 1903 or so, but I couldn't say for sure.

Q. And, your aunt?

A. Well, to tell the truth, I don't know exactly about my aunt. I know she was German.

Q. Do you have any other relatives here?

A. I have two cousins.

Q. Where are they?
A. They live near San Francisco, Contra Costa.
Q. Are you employed?
A. Yes.
Q. By whom?
A. In Ojai, by the Ojai Valley Inn.
Q. How long have you been employed there?
A. I have been employed there since January, 1954.
Q. What do you do?
A. I am desk clerk.
Q. What is your salary?
A. $400.
Q. Per month?
A. Per month.
Q. Do you have any other income from any source?
A. No, I don't.
Q. Do you own any property in the United States, real property, real estate?
A. No.
Q. Do you have any money saved?
A. Yes, sir.
Q. In the bank?
A. Yes.
Q. How much?
A. I think I have about $2,000.
Q. Do you have any other personal property?
A. No.
Q. Didn't you mention an automobile?
A. Oh, yes, a car—did you mention a radio or phonograph?
Q. I will ask you another question; do you have any other personal property, except personal possessions of clothing?
A. I have a radio; a gramophone.
Q. Have you ever previously been arrested, charged with any criminal offense, anywhere?
A. No, sir.
Q. Have you been fingerprinted?
A. Yes, sir.
Q. Where?
A. At the County jail here.

38

Q. Is that in connection with your arrest as admitted in allegation #5, in the Order to Show Cause?

A. Yes.

Q. In connection with that arrest, I show you and your counsel, certified copies of the court proceedings in that case, and ask you if you are the person named in this record, and if the facts as related therein are correct?

A. Yes, sir, it is correct.

SPECIAL INQUIRY OFFICER:

Certified copies of the information and judgment are received in evidence and marked Exhibit 2.

SPECIAL INQUIRY OFFICER TO RESPONDENT:

Q. You have never been arrested on any other occasion; is that correct?

A. One time before.

Q. When?

A. In 1953.

Q. Where?

A. Here in Los Angeles.

Q. On what charge?

A. I don't remember; misdemeanor. I think they called it.

39 Q. Well, what was the charge?

A. You mean the fine?

Q. What criminal violation, what offense were you charged with?

COUNSEL (interposing) TO RESPONDENT:

Q. What was the nature of the offense you were charged with?

A. I don't know how to explain; I don't know if it was a felony; I don't remember.

SPECIAL INQUIRY OFFICER TO RESPONDENT:

Q. You don't remember?

A. It was almost a similar case.

Q. What is your answer to that question; I have asked you a question for the record; with what offense were you charged?

A. (No answer.)

Q. Similar to this as reflected by Exhibit 2?

A. Yes.

Q. And, how did you plead at that time?

A. Guilty.

Q. Were you sentenced?

A. I don't remember whether it was $50 or $100 fine.

Q. How long were you in jail?

A. I was arrested; I wasn't in jail, but I was released on bail.

Q. And, you appeared in court and entered your plea; is that correct?

A. Yes.

Q. Have you been arrested on ar other occasion for any offense?

A. I was arrested, but I wasn't guilty.

Q. The question was, were you arrested?

A. Yes.

Q. When?

A. I don't remember the exact time.

Q. What year?

A. 1958.

40 Q. Last year?

A. Last year.

Q. Where?

A. Oxnard.

Q. And, were you charged formally with any offense at that time; were you taken into court?

A. No, the case was dismissed.

Q. Did you appear in court?

A. No, I didn't; I appeared for the hearing.

Q. Preliminary hearing?

A. Yes, that is what they called it.

Q. Were the charges dismissed?

A. No, I plead not guilty.

Q. Did you have a trial?

A. No, I didn't have a trial.

Q. What disposition was made of your case at that time, if you plead not guilty? Did you go before the judge?

A. On the preliminary hearing.

Q. And, you plead not guilty?

A. Yes.

Q. And, the judge found you not guilty, or did you have a trial?

A. I didn't have a trial.

Q. How were you informed that the charges had been dismissed?

A. By my attorney.

Q. You have admitted the allegation #3, that you last entered the United States at San Ysidro, California, during August, 1956; how long had you been in Mexico immediately preceding this entry?

A. About a couple hours.

Q. Why did you go to Mexico?

A. I went to Ensenada.

Q. For what purpose?

A. Just visiting; taking a trip.

Q. Did you go to Mexico from the United States?

A. Yes.

Q. When did you first enter the United States?

A. October the 9th, 1952.

41 Q. And, where did you enter at that time?

A. At Rouses Point, New York.

Q. Were you lawfully admitted to the United States?

A. Yes.

Q. For how long a period of time were you admitted?

A. Permanent.

Q. Do you have any evidence of your lawful admission for permanent residence at that place?

A. Yes, a card, an alien card.

Q. And, where is the alien card?

A. You have it; the Immigration and Naturalization Service has it.

Q. You mean it was picked up when these proceedings were instituted?

A. Yes, it was taken up by Mr. Perkins.

Q. Had you been in the United States at any time prior to that entry in 1952?

A. No, I didn't enter.

Q. How many times have you been absent from the United States since this entry in 1952?

A. The only time, when I went down to Ensenada.

Q. In August, 1956?

A. Well, I wasn't sure about the time; when he asked me, 1956 or 1957, well, I still don't recollect exactly, because it was such a short trip, couple hours and I have no proof.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Mr. Porter, do you wish to ask the respondent any questions or submit any evidence in his behalf?

COUNSEL:

Yes, I have a letter from Mr. William G. Briggs, the Managing Director of the Ojai Valley Inn, where Mr. Fleuti is employed, and I should like to ask this be received for whatever purpose it might serve in these proceedings.

SPECIAL INQUIRY OFFICER:

Received in evidence and marked Exhibit 3.

42 SPECIAL INQUIRY OFFICER TO COUNSEL:

Anything further?

COUNSEL:

That is all, sir; I believe I have nothing further.

SPECIAL INQUIRY OFFICER TO RESPONDENT:

As you have admitted as being true, the factual allegations contained in the Order to Show Cause and have further admitted that you are deportable from the United States on the charge set forth therein, I have concluded that your deportability has been established and will enter the following order:

It is ordered that the respondent be deported from the United States in the manner provided by law on the charge contained in the Order to Show Cause.

SPECIAL INQUIRY OFFICER TO RESPONDENT:

Q. You have the right to appeal from this decision and order to the Board of Immigration Appeals at Washington, D.C. Do you wish to appeal?

COUNSEL:

For the record, the respondent does not wish to appeal.

SPECIAL INQUIRY OFFICER:

Then, the order is final.

Have the record show the respondent is served with a written copy of the decision and order in this case.

Hearing closed.

HEARING CLOSED

I certify: That to the best of my knowledge and belief, the foregoing transcript is a true and correct report of everything that was stated during the course of the hearing, excluding statements made off the record: (Trans. 5–18–59.)

Edythe D. Marusa.
EDYTHE D. MARUSA,
Reporter-Stenographer.

42 *George Fleuti vs.*

43 *Exhibit 1*

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
UNITED STATES OF AMERICA

File No. A-8 382 426

In the Matter of)
) In Deportation Proceedings under Section 242
) of the Immigration and Nationality Act
George Ernst Marcel FLEUTI)
) ORDER TO SHOW CAUSE
) and
) NOTICE OF HEARING
Respondent.)

To: George Ernst Marcel Fleuti
305 W. Montgomery
Ojai, California

IT APPEARING, That you are in the United States in violation of law in that

1. You are not a citizen or national of the United States.
2. You are a native of Switzerland and a national of Switzerland
3. You last entered the United States at San Ysidro, California during August, 1956.
4. You were then admitted as a returning resident alien.
5. You were convicted in the Superior Court of the State of California, in and for the County of Los Angeles, for sex perversion in violation of Section 288a, Penal Code of California, on March 9, 1956.

Admits
Admits
Admits
Admits
Admits

and that you are subject to be taken into custody and deported pursuant to the following provision(s) of law:

Admits

Section 241(a) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude, under Section 212(a)(9) of the Act; SEX PERVERSION.

Exhibit #1
APR 20 1959

IT IS ORDERED, That you appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at Room 244, 458 So. Spring Street, Los Angeles, Calif. on Tuesday April 14, 1959 at 10 a.m. and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: April 7, 1959

IMMIGRATION AND NATURALIZATION SERVICE
Alfred K. Nielsen
ALFRED K. NIELSEN, District Director
for Investigations, Los Angeles, California

Form I-221 (Rev. 9-15-57) Fingerprinted: 3-25-59 (over)

44 *Exhibit 2*

In the Superior Court of the State of California in and for the County of Los Angeles

S.C. No. 178942

D.A. No. 218229

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

GEORGE MARCEL FLEUTI AND JOHN FREDRICK BEMENT, DEFENDANTS

INFORMATION—VIO. SECTION 288a, PENAL CODE

The said George Marcel Fleuti and John Fredrick Bement accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Violation of Section 288a, Penal Code of California, a felony, committed as follows: That the said George Marcel Fleuti and John Fredrick Bement, on or about the 16th day of February 1956 at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously participate in the act of copulating the sexual organ, to wit, the penis, of him, the said George Marcel Fleuti, with the mouth of John Fredrick Bement.

Filed in open Superior Court of the State of California, on motion of the District Attorney of said county.

Dated: Mar. 5, 1956.

HAROLD J. OSTLY,
Clerk.

By (S) H. H. Baruch,
H. H. BARUCH,
Deputy.

bam.

45 *Exhibit 2*

In the Superior Court of the State of California in and for the County of Los Angeles

MINUTES

March 9, 1956

Present: Hon. HERBERT V. WALKER, Judge

Department No. 41

178942

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

GEORGE MACEL FLEUTI, DEFENDANT

Deputy District Attorney Malcom Harris and the Defendant with his counsel, J. Armstrong for G. T. Root, present. Defendant enters his plea of "Guilty as charged in the information". Defendant waives time for sentence. Sentence as indicated. Bail exonerated. Released.

Whereas the said defendant having duly pleaded guilty in this court of the crime of Violation of Section 288a, Penal Code of California, a felony, as charged in the information.

It is therefore ordered, adjudged and decreed that the said defendant must pay a fine in the sum of $200 within one week or serve one day in the County Jail for each $5 of said fine not paid.

Stay of execution of payment of fine is granted to March 16, 1956, at 2:00 p.m.

This Minute Order has been entered on .....

HAROLD J. OSTLY,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By ——— ———, *Deputy.*

Minutes—Fine.

Not remanded.

APRIL 20, 1959.

46 *Exhibit 3*

OJAI VALLEY INN
AND COUNTRY CLUB,
Ojai, California, April 17, 1959.

IMMIGRATION AND NATURALIZATION SERVICE,
458 South Spring Street, Los Angeles, California.

DEAR SIR: Mr. George Fleuti has worked directly under me for three years and eight months. Before that, Mr. Fleuti was employed here for one year and nine months. In other words, he has worked here at the Ojai Valley Inn and Country Club for a total of five years, three and one-half months.

I have thought enough of Mr. Fleuti and his ability to keep him in continuous employment and approximately one year ago made him Front Office Manager, directly responsible to me and in charge of approximately eight employees. His salary has been increased steadily as a result of his conscientious and efficient efforts toward making our operation the success that it is.

I personally, as Managing Director of this organization feel it would be a very serious matter should we have to lose the background and experience that Mr. Fleuti contributes to this organization.

From my observation, Mr. Fleuti's honesty is above reproach, as over a half million dollars pass through his hands each twelve months. We have never had any reason to doubt his honesty. Regarding character and normal attitude as regards the Ojai Valley Inn and Country Club and the employees that we have here steadily employed, there has never been any question, nor have I ever had to reprimand him in any way.

47 Other than one incident approximately three years ago, I have never known Mr. Fleuti to be in any way involved with the law in any respect.

Mr. Fleuti's position here at the Ojai Valley Inn and Country

Club will most certainly be secure and we would certainly find it very difficult to replace him.

Sincerely,

OJAI VALLEY INN AND COUNTRY CLUB,
William G. Briggs,
WILLIAM G. BRIGGS,
Managing Director.

WGB:rl.
APR. 20, 1959.

48 File No. A-8 382 428

UNITED STATES OF AMERICA
UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE

In Deportation Proceedings Under Section 242 of the Immigration and Nationality Act

IN THE MATTER OF GEORGE ERNST MARCEL FLEUTI, RESPONDENT

DECISION OF THE SPECIAL INQUIRY OFFICER

The above-named respondent having appeared before me for hearing on this date, pursuant to the annexed Order To Show Cause, and having admitted that the factual allegations contained therein are true, and having further admitted that (s)he is deportable from the United States on the charges set forth therein, I have concluded that deportability has been thereby established (8 CFR 242.16(b)).

Respondent has not applied for any discretionary relief.

Respondent has specified Switzerland as the country to which deportation should be directed in the event respondent's deportation is required by law.

Order: It is ordered that the respondent be deported from

the United States in the manner provided by law on the charge(s) contained in the Order To Show Cause.

BERT F. KEARNEY,
Special Inquiry Officer.

Date: April 20, 1959.

Copy of this decision has been served upon the respondent.

Appeal: Waived.

BERT F. KEARNEY,
Special Inquiry Officer.

49 UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

458 SOUTH SPRING STREET,
LOS ANGELES 13, CALIFORNIA.
July 6, 1959.

File No. A8 382 428—Los Angeles

IN RE: GEORGE ERNST MARCEL FLEUTI

IN DEPORTATION PROCEEDINGS

In behalf of respondent: Mr. Richard F. Porter, Attorney at Law, 202 North Hawthorne Boulevard, Hawthorne, California.

In behalf of the service: John B. Bartos, Examining Officer.

Charges: Order: Excludable at entry—convicted of crime involving moral turpitude. Lodged: None.

MOTION TO SPECIAL INQUIRY OFFICER TO REOPEN PROCEEDINGS

The respondent is a 47-year-old single male, a native and citizen of Switzerland, who was lawfully admitted into the United States for permanent residence at Rouses Point, New York, on October 9, 1952 and who last entered the United States at San Ysidro, California during August, 1956 and was admitted as a returning resident alien.

An Order to Show Cause containing the above charge was issued on April 7, 1959, and the respondent was accorded a hearing under that order on April 14, 1959, and on April 20, 1959, and during the hearing the respondent admitted all of the allegations and the charge of deportability contained in the Order to Show Cause. Pursuant to this hearing he was

ordered deported from the United States on April 20, 1959.

The charge of deportability arose out of his conviction in the Superior Court of the State of California, in and for the County of Los Angeles, on March 9, 1956, as a result of his plea of guilty to violation of Section 288a, Penal Code of California, a felony as charged in the Information.

As a result of this conviction a judgment was entered that the respondent must pay a fine in the sum of Two Hundred Dollars within one week or serve one day in the County Jail for each Five Dollars of said fine not paid.

50 A stay of execution of the payment of claim was granted to March 16, 1956. Were the fine not paid it would have been necessary for the respondent to have served a term of forty days in the County Jail.

Section 288a of the Penal Code of the State of California reads as follows:

"Any persons participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year; provided, however, whenever any person is found guilty of the offense specified herein, and it is charged and admitted or found to be true that he is more than 10 years older than his coparticipant in such an act, which coparticipant is under the age of 14, or that he has compelled the other's participation in such an act by force, violence, duress, menace, or threat of great bodily harm, he shall be punished by imprisonment in the state prison for not less than three years. The order of commitment shall expressly state whether a person convicted hereunder is more than 10 years older than his coparticipant and whether such coparticipant is under the age of 14. The order shall also state whether a person convicted hereunder has compelled coparticipation in his act by force, violence, duress, menace, or threat of great bodily harm."

Section 17 of the Penal Code of the State of California reads as follows:

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the

state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

Section 4 of the Act of September 3, 1954 provides as follows:

"Any alien who is excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of Section 1(3) of Title 18, United States Code, *by reason of the punishment actually imposed*, or who is excludable as one who admits the commission of such misdemeanor, may hereafter be granted a visa and admitted to the United States, if otherwise admissible: provided, that the alien has committed only one such offense."

From the foregoing, the respondent on March 9, 1956 was convicted of a misdemeanor, and by reason of the punishment actually imposed, such misdemeanor is classifiable as a petty offense.

51 By reason of this conviction, the respondent was not excludable at the time of his last entry into the United States at San Ysidro, California during [illegible], 1956. However, the respondent on August 27, 1953, in the Municipal Court of the Los Angeles Judicial District of the County of Los Angeles, State of California, was convicted as being wilfully and unlawfully a lewd and dissolute person and on November 5, 1958, at Oxnard, California, he was arrested as being a lewd vagrant.

In view of the foregoing, this hearing should be reopened for the presentation of further evidence in the case and for a further determination of deportability. There is attached hereto as evidence a certified copy of the aforementioned conviction of August 27, 1953, together with a fingerprinting return from the Federal Bureau of Investigation showing the arrest of November 5, 1958.

Motion: It Is Moved that the hearing in this case be reopened for the presentation of additional evidence and further hearing to determine deportability.

John B. Bartos.
JOHN B. BARTOS,
Examining Officer.

52 UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

Date: July 22, 1959
District: Los Angeles, California
File No. A-8 382 428

In behalf of respondent: Mr. Richard F. Porter, Attorney at Law, 202 North Hawthorne Boulevard, Hawthorne, California.

IN THE MATTER OF DEPORTATION PROCEEDINGS

against

GEORGE ERNST MARCEL FLEUTI, RESPONDENT

ORDER OF SPECIAL INQUIRY OFFICER GRANTING MOTION TO REOPEN

Upon Reading and Considering the attached motion, It Is Ordered that deportation proceedings herein be reopened.

Bert F. Kearney,
BERT F. KEARNEY,
Special Inquiry Officer.

BFK: em.

53 UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

File: A8 382 428—Los Angeles

MATTER OF GEORGE ERNST MARCEL FLEUTI, RESPONDENT

IN DEPORTATION PROCEEDINGS—TRANSCRIPT OF HEARING

Reopened.

Hearing held on August 5, 1959, at Los Angeles, California, before Special Inquiry Officer: Bert F. Kearney.

Recorded by Lori Parker. Language: English. Official Interpreter ————. Other Interpreter ————.

APPEARANCES

On behalf of Service: Richard L. Lay, Examining Officer.

On behalf of Respondent: Richard F. Porter, Esq., 202 No. Hawthorne Blvd., Hawthorne, California.

Form I-297.

(4-1-59.)

54 SPECIAL INQUIRY OFFICER (Hereinafter designated as INQUIRY OFFICER) TO COUNSEL:

Q. Proceedings in this case were ordered reopened by order of the Special Inquiry Officer dated July 22, 1959. Do you have a copy of that order, Mr. Porter?

A. I don't believe so, sir. I have an order dated July 29. Oh yes, we do have a copy.

Q. This order was based upon a motion submitted by the Government dated July 6, 1959. Do you have also a copy of that motion?

A. Yes, we do.

Q. Signed by John B. Bartos, Examining Officer?

A. Yes, sir.

Q. Is it stipulated that the respondent named in this order to reopen is the respondent here present this morning?

A. So stipulated.

Q. Are you ready to proceed?

A. We are ready.

INQUIRY OFFICER TO EXAMINING OFFICER:

Q. Are you ready, Mr. Lay?

A. Yes.

INQUIRY OFFICER TO RESPONDENT:

Q. Please stand and raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes, sir.

Q. What is your name?

A. George "Marcel Ernst" Fleuti.

Q. Are you known as George "Ernst Marcel" Fleuti?

A. Yes, sir.

Q. Alright Mr. Lay, you may proceed.

55 BY EXAMINING OFFICER:

In conformity with the previously mentioned motion to reopen the proceedings in this case, I now present to the Special Inquiry Officer, Form I-261, additional charges of deportability, setting forth an additional charge of deportability and additional allegations of fact in support of that charge, numbered six through ten inclusive. May the record show that, at this time, I serve upon counsel for the respondent a signed copy of the same form and may the record further show that at the time of the notification of the hearing scheduled for this date, copies of the Form I-261 were furnished to the respondent and counsel as a prior notice of the intent to lodge the additional allegations and charge.

INQUIRY OFFICER TO COUNSEL:

Q. Do you have those copies, Mr. Porter?

A. Yes, we have.

Q. Is it stipulated that the respondent understands these additional allegations and the additional charge?

A. We will stipulate to that, yes your honor.

Q. Do you wish any further time to prepare a defense or meet this additional charge and the allegations?

A. Yes. I spoke to Mr. Lay about that and we would ask that we be given a period of ten days within which to furnish a written report which we will send to Mr. Lay for his perusal and if both sides are agreeable that a decision can be rendered based upon the report and the evidence which Mr. Lay now has, that there will be no further hearing, but if either party does not desire that a decision be rendered merely on that, that further hearing be had on this matter.

INQUIRY OFFICER TO EXAMINING OFFICER:

Q. I presume that Mr. Lay has some evidence that he wishes to offer this morning. Is that correct?

A. Yes. I discussed a possible stipulation with counsel for the respondent and under the proposed stipulation it was assumed that a plea would be made to the allegations, the new allegations, and the new charge this morning and
56 evidence will be presented by the Government as required under the conditions of the plea and the stipula-

tion regarding a medical report in behalf of the respondent. Insofar as I understood the matter, it was in anticipation that the hearing would be closed this morning on the basis of the plea and evidence submitted under an agreement that the report would be submitted through me for possible inclusion in the evidence without a reopening or that upon an informal request by either party the hearing would be reopened for receipt of the proposed evidence.

INQUIRY OFFICER TO COUNSEL:

Q. Is that your understanding, Mr. Porter?

A. Yes, that is.

Q. Then, are you willing, at this time, to answer and plead to the charge and the allegations in the additional charge of deportability?

A. Yes, we are.

Q. Do you waive reading of the additional allegations and the charge to the respondent?

A. Yes, we do.

Q. Does the respondent admit or deny the truth of allegation number 6?

A. Respondent admits the truth of that allegation.

Q. Does the respondent admit or deny the truth of allegation number 7?

A. He admits it to the extent that—well—perhaps—, could I make a qualified admission or denial on this or do they have to be——

Q. Well, if there is such a certification, that is not admitting, of course, that he is afflicted with a psychopathic personality, it is merely an allegation that he was certified on that date by an official as being so afflicted.

A. Well, with that understanding he would admit that I guess.

Q. It is not an admission, of course, that he is afflicted or was afflicted——

57 A. Just an admission that there was a certification.

Q. And that is admitted as being true?

A. Yes.

Q. Does the respondent admit or deny the truth of allegation number 8, which is again, the same type of allegation, that this official certified that the condition existed prior to the time of entry?

A. We admit allegation number 8.

Q. Do you admit or deny the truth of allegation number 9?

A. Respondent denies that one.

Q. Does the respondent admit or deny the truth of allegation number 10?

A. He also denies that one.

Q. Does the respondent admit or deny that he is deportable from the United States on the additional charge lodged?

A. He denies that.

Q. The Form I-261, additional charges of deportability, is received in evidence and marked Exhibit number 4.

INQUIRY OFFICER TO EXAMINING OFFICER:

Q. Alright, Mr. Lay, you may proceed.

A. In view of the nature of allegations 6, 7, and 8, as contained in Exhibit number 4, I desire, at this time, for completion of the record, to present through the respondent and his counsel, for introduction into the evidence in this proceedings, Public Health Service Form 124, Medical Certificate, and Form FS 398, Medical Examination of Visa Applicants, containing the certification of the Public Health official as set out in allegations 6, 7, and 8.

Q. The documents referred to are received in evidence and both marked as one Exhibit, number 5.

EXAMINING OFFICER TO RESPONDENT:

Q. Are you the same George Ernst Marcel Fleuti who
58 appeared before an officer of this Service at Ventura, California, on March 25, 1959, and made a sworn statement concerning your immigration status in the United States?

A. Yes, I am.

Q. I show to you and your counsel Form I-215A, affidavit, executed at that place, on that date, before Herbert B. Perkins, Investigator, consisting of two typewritten pages. At the bottom of the second page appears the signature of George Fleuti. I ask you if that is your signature.

A. Yes, it is.

Q. Did you read this document prior to signing it at that time?

A. Yes, I did.

Q. It is noted that on page one there appears, in the fourth paragraph of that page, a typewritten correction and a pen and ink correction, and in the last paragraph of that page appears a pen and ink correction near which, in each case, there are placed the initials G. F. Did you place those initials on those corrections?

A. Yes, I did.

Q. Were those corrections made in the transcript at your request?

A. Yes, it was my request.

Q. It is also noted, on the second page, in the fourth complete paragraph contained on that page, there appears a pen and ink correction bearing the initials G. F. Did you place those initials there and was that correction made at your request?

A. Yes, it was.

Q. At the time you executed this affidavit did you testify truthfully to the best of your knowledge and ability?

A. Yes.

Q. I desire, at this time, to offer the transcript of the statement just identified, for introduction into the evidence in this proceedings and may the record reflect that, at this time, the transcript is presented to counsel and respondent for their reading prior to its offer to the Special Inquiry Officer.

59 BY COUNSEL:

I will make a formal objection to its being received in evidence.

BY INQUIRY OFFICER:

Overruled. Received in evidence and marked Exhibit number 6.

EXAMINING OFFICER TO RESPONDENT:

Q. During this proceedings you have testified concerning an arrest and conviction in Los Angeles, California, in 1953. At this time I show to you and your counsel a certified copy

of complaint and transcript of docket in the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, in the case of George M. Fleuti, Defendant, number 16,581. I ask you to examine these documents and state whether you are the George M. Fleuti named as the defendant therein and whether these records relate to the arrest and conviction of which you have testified in this proceedings.

BY COUNSEL:

We can stipulate to that, that that is a correct copy of the record and relates to the respondent.

BY EXAMINING OFFICER:

I desire to offer the document for introduction into the evidence in this proceedings.

BY INQUIRY OFFICER:

Received in evidence and marked Exhibit number 7, both the certified copy of the complaint and the transcript of docket, as one exhibit.

EXAMINING OFFICER TO RESPONDENT:

Q. Mr. Fleuti, have you been out of the United States for any period of time whatsoever since your last appearance here?

A. No, I haven't.

60 Q. On April 20, 1959?

A. No, I haven't.

Q. Is your marital and occupational status still the same as that to which you then testified?

A. I didn't understand, sir.

Q. Is your marital status still the same as that when you then testified? In other words, are you still single?

A. Oh, yes.

Q. Are you still employed in the same position?

A. Yes, I am.

Q. And is your financial condition, or your property assets in the United States, still approximately the same as then?

A. The same, yes.

Q. At this time I have no further evidence to offer nor further questions of the respondent.

INQUIRY OFFICER TO COUNSEL:

Q. Mr. Porter, do you wish to ask the respondent any questions or submit any evidence at this time?

A. We do not desire to do so at this time, sir.

Q. As I understand it, the hearing may be closed, at this time, with the stipulation that you will present a medical report from the psychiatrist to Mr. Lay.

A. Yes.

Q. And if for any reason either party desires the proceeding reopened, I will reopen on my own motion.

A. That is agreeable to us.

Q. How long a period of time will you require to submit this evidence?

A. We should like to have ten days, sir.

INQUIRY OFFICER TO EXAMINING OFFICER:

Q. Do you have anything further, Mr. Lay, other than to inspect this report?

61 A. Nothing further.

INQUIRY OFFICER TO RESPONDENT:

Then the hearing will be closed. As soon as possible after receipt of the stipulated evidence, I will prepare, in writing, a decision, setting forth a summary of the evidence, findings of fact, conclusions of law, and an order disposing of the case, copy of which decision and order will be served on your counsel. You will be allowed a period, after receipt thereof, not to exceed ten days in which to take an appeal, file any exceptions, or submit any brief or argument in the matter.

Hearing is closed.

* * * * *

I certify that to the best of my knowledge and belief the foregoing transcript is a true and correct report of everything that was stated during the course of the hearing, including oaths administered and rulings on objections, but excluding statements made off the record.

Lori Parker,
LORI PARKER,
Shorthand Reporter.

(8 6 59.)

George Fleuti vs.

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

File: A-8 382 428

MATTER OF GEORGE ERNST MARCEL FLEUTI, RESPONDENT

DEPORTATION PROCEEDINGS—TRANSCRIPT OF HEARING

Continued.

Reopened.

Hearing held on August 26, 1959, at Los Angeles, California, before Special Inquiry Officer Bert F. Kearney. Recorded by Ruthe D. Maruse, Stenographer. Language: English. Official Interpreter ..... Other Interpreter .....

APPEARANCES

On behalf of Service: Richard L. Lay, Examining Officer.

On behalf of Respondent: Richard F. Porter, Esquire, 202 North Hawthorne Blvd., Hawthorne, California.

Form I-297.

(4-1-59.)

Hearing conducted in the English Language.

BY SPECIAL INQUIRY OFFICER (Hereinafter designated INQUIRY OFFICER):

The proceedings in the case of the respondent, George Ernst Marcel Fleuti was closed on August 5th, 1959, with an agreement between the Examining Officer and Counsel for respondent, that if either the Examining Officer, or the Counsel for the respondent wished to cross-examine Dr. Dahlgren of the United States Public Health Service, or the psychiatrist who had submitted a report by Counsel for respondent, that the Special Inquiry Officer would reopen the proceedings on his own motion. I have received a communication from Mr. Porter, the attorney for the respondent, that he wishes to cross-examine Dr. Dahlgren, and in accordance with the request, have ordered the proceedings reopened on my own motion.

INQUIRY OFFICER TO COUNSEL:

Are you ready to proceed, Mr. Porter?

COUNSEL:

Yes, we are.

INQUIRY OFFICER TO EXAMINING OFFICER:

Mr. Lay?

EXAMINING OFFICER:

Yes, sir.

INQUIRY OFFICER TO RESPONDENT:

Q. Please stand and raise your right hand. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth; SO HELP YOU GOD?

A. I do.

Q. What is your name?

A. George Ernst Marcel Fleuti.

INQUIRY OFFICER TO EXAMINING OFFICER:

Mr. Lay, has Dr. Dahlgren been made available for cross-examination?

64 EXAMINING OFFICER:

Dr. Dahlgren is present. Prior to his presentation as a witness, I would desire the introduction in the evidence in this proceeding of the psychiatric report previously referred to between myself and Counsel for respondent, which was submitted in accordance with our agreement, to me. I have the report, dated August 10th, 1959, signed by David R. M. Harvey, M.D., Diplomate, American Board of Psychiatry and Neurology, and I would ask that it be entered in evidence in this proceeding, and I waive the right of cross-examination of Dr. Harvey in connection with its admission into the evidence.

INQUIRY OFFICER TO COUNSEL:

Is this the report, Mr. Porter?

COUNSEL:

Yes, I believe it is [examines same]. Yes, that is, thank you.

INQUIRY OFFICER:

The report referred to is received in evidence and marked Exhibit 8.

EXAMINING OFFICER TO INQUIRY OFFICER:

I am ready to present Dr. Dahlgren, and he may be sworn.

Witness Dahlgren called.

INQUIRY OFFICER TO WITNESS:

Q. Please stand and raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth; so help you God?

A. I do.

Q. What is your name and position?

A. Arthur R. Dahlgren, Senior Surgeon, United States Public Health Service.

INQUIRY OFFICER TO COUNSEL:

All right, Mr. Porter.

65 COUNSEL TO EXAMINING OFFICER:

Is there any direct examination of Dr. Dahlgren, Mr. Lay?

EXAMINING OFFICER:

I do not wish to have any direct. I believe it might be advantageous to the record if I might have Dr. Dahlgren identify his signature on Exhibit 5 of the proceeding, and also, as identification, or for acknowledgement of having examined Exhibit No. 8.

INQUIRY OFFICER TO EXAMINING OFFICER:

All right, you may proceed.

EXAMINING OFFICER TO WITNESS:

Q. Dr. Dahlgren, I show you two forms that have been previously entered in the evidence in this proceedings, together as Exhibit 5, bearing the signature of A. R. Dahlgren, Senior Surgeon, and ask you if that is your signature?

A. That is.

Q. Did you prepare these certifications or documents upon your examination of the respondent here in this proceeding?

A. They were prepared by the clerk in our office, signed by me.

Q. I also show to you a document which I believe you heard me identify and is now identified as Exhibit 8. Did you have

an opportunity before this proceeding to examine that document?

A. I did.

Q. For further clarification of the record, Doctor, Exhibit 5, indicates a certification by you of Psychopathic Personality in reference to the respondent. Is that terminology defined for your use by the regulations and statutes relating to the Public Health Service?

A. This terminology is expressed in the Manual for Medical Examination of Aliens to which we must comply in certifying these applicants. Does that answer your question?

Q. Yes, sir. In that manual, is it prescribed that a sexual deviate shall be classified as of psychopathic personality?

A. It does, if I may be allowed to quote the page and reference; this is the Manual for Medical Examination of Aliens we are in, Chapter 6, Page 5, under Paragraph No. 6, in
66 which the term, Psychopathic Personality, appears in print, and under subparagraph b. it states under this category, will be classified those applicants who are diagnosed as sexual deviates.

Q. The term, then, Psychopathic Personality, is a legal term as described by the manual; is that correct?

A. That is correct.

EXAMINING OFFICER:

I have no further questions of the witness.

INQUIRY OFFICER TO COUNSEL:

Please cross-examine, if you wish, Mr. Porter.

COUNSEL TO WITNESS:

Q. Mr. Dahlgren, what are your primary duties in your position at the present time?

A. I am Deputy Medical Officer in charge of the Out-Patient Clinic, U.S. Public Health Service, 424 Federal Building, Los Angeles.

Q. In that position, do you conduct both physical and psychiatric examinations?

A. We conduct physical examinations; we treat people; we treat peopl under medicare. Medicare is a Government term used for the treatment of the dependents of the Armed Services.

Q. This is what your office does; is that right?

A. We do many things in that office.

Q. What I am getting at, I ask what you, yourself, do personally?

A. Anything that has to be done.

Q. Do you, yourself, make both physical and psychiatric examinations?

A. I make no formal psychiatric examinations.

Q. Do you, yourself, have training in the field of psychiatry?

A. No formal training in the field of psychiatry.

Q. You are a medical doctor?

A. I am a M.D., licensed to practice in this State, and commissioned officer in the United States Public Health Service.

67 Q. Do you recall the date your department examined Mr. Fleuti?

A. I do.

Q. Do you recall approximately how much time you spent with Mr. Fleuti on that date?

A. Mr. Fleuti entered the clinic at 9:30 in the morning. The number of minutes he was actually there, I presume, an hour, plus or minus.

Q. And do you recall what the examination consisted of that was made of Mr. Fleuti, Doctor?

A. I do.

Q. Tell us, pretty much in detail, what it consisted of?

A. The history of Mr. Fleuti was reviewed, both as to medical illnesses, questions in regard to his sexual practices were asked, and there was a review of the records accompanying Mr. Fleuti, and it included x-ray, neurological report and urinalysis.

Q. I am correct in saying, you performed, more or less of the physical examination, in addition to this interview of taking the history; is that correct?

A. That is correct.

Q. And, you stated there were certain papers which accompanied this examination request; is that correct?

A. That is correct.

Q. And in the course of the examination, you would refer to the reports or the other papers you received?

A. They were reviewed as part of the medical history in this case.

Q. Do you recall whether Mr. Fleuti gave you any information which was not already covered in those reports which you received?

A. I would say that perhaps there were some details, not included in the statements.

Q. Then, I take it, you did not copy down what he said in the interview relating to his history; is that correct?

A. Notes were taken.

68 Q. When Mr. Fleuti was sent to you for examination, you were requested by the Immigration and Naturalization Service to render a report or make an evaluation?

A. That is correct.

Q. And, you have never acted as Mr. Fleuti's attending physician or seen him in any other capacity?

A. That is correct.

Q. Can you tell us briefly, Doctor, what factors or what evidence you based your evaluation of Mr. Fleuti on?

A. The history and the documentation of the, shall we say, arrest.

Q. Did you prepare a written report other than the certificate which you signed and which Mr. Fleuti referred to?

A. Two forms, F.S. 398, and a similar one, were the only forms prepared—P.H.S. 124.

Q. And, the other one was F.S. 398?

A. That is there.

COUNSEL TO EXAMINING OFFICER:

Could I take a glance at those documents.

EXAMINING OFFICER:

May the record reflect that for Counsel's use in regard to the forms just identified by the Doctor, there are furnished to him, the two forms made Exhibit 5, in these proceedings, and I would like that it be noted that the forms furnished by the Doctor and identified by him, are copies of Exhibit 5.

COUNSEL:

They appear to be identical.

INQUIRY OFFICER TO COUNSEL:

Are you satisfied with that statement, Mr. Porter?

COUNSEL:

I wonder——

COUNSEL TO WITNESS:

Q. Is this form at the end, Doctor; is that also prepared as a result of the examination?

A. No—to which are you referring? This is merely a
69 written statement to me regarding a subpoena.

COUNSEL:

Oh, I see.

EXAMINING OFFICER:

The record will show Mr. Porter is referring to a document in regard to a subpoena of the Doctor as a witness.

INQUIRY OFFICER TO COUNSEL:

Q. Mr. Lay has stated these certificates are copies of the Exhibits in the file, which you have just read.

A. Yes, that is true.

COUNSEL TO WITNESS:

Q. I believe you stated, Doctor, the evaluation which you made of Mr. Fleuti was based on the history and information which you elicited from him, and also the reports which you read?

A. That is correct.

Q. And, there was nothing in the physical examination part of the examination, I take it, which would be a basis that you used in determining this evaluation?

A. There would not.

Q. Perhaps, I could go just a minute into some medical terms; in the field of psychiatry, I believe that disorders are usually classified either constitutional disorders, meaning based on either organic or toxic causes—correct me if I am wrong—I am leading up to a question—constitutional disorders as opposed to functional disorders. Do you know of any such?

A. I would be inclined to answer, I served at the Service Center for Federal Prisoners for over five years. This is an

institution for the treatment of Federal prisoners, some of whom were psychiatric, some of whom were psychopaths. The term C.P.I. was used in referring to constitutional psychopathic inferiority. Now the term is used as psychopathic constitutional, which means this individual was so born.

70 Q. Well, now, that is what constitutional disorder means to you; is that correct?

A. Yes.

Q. And, do you know another category, called functional disorders?

A. Surely, we have functional diseases.

Q. And, the constitutional one is one which is based on some actual physical disorder, and I say—correct me if I am wrong—I am going on what I have read. As I understand it, Doctor, constitutional disorders ordinarily have either organic or toxic origins?

A. Toxic means a poison; now, constitutional means this individual was so born; that he was born this way; are you trying to make the difference between organic and functional disease?

Q. I imagine that is what it amounts to; well, in this particular case, Dr. Dahlgren, from your examination of Mr. Fleuti, would you consider him to be with constitutional disorder?

A. I would decline to answer that, and may I say, both by my review of the records and by my training and knowledge, and in conjunction with Dr. Harvey, this gentleman is a sexual deviate; there is no question as to that; your psychiatrist puts that in words. I will read to you, if you so choose. By my findings and by the instructions I must follow, I have to place these deviates in this category.

Q. I am trying to separate from the regulations you must follow and what might perhaps be the regular definitions.

A. We have to use certain terminology—and the rest of the world may not agree with this terminology; we are so ordered; therefore, we do; to quote, as an example, all of us know the disease, tuberculosis. To conform to the law in regards to immigrants, we cannot certify a patient as having arrested tuberculosis, as Class B. We must classify this as

pulmonary fibrosis, Class B. In common practice and among good doctors in the medical profession, this would be termed as Pulmonary Tuberculos, arrested. So it is with this case, we have to use certain words to conform and as we are told we must use it, so when Doctor Harvey says he cannot believe this man is a true psychopath, he has yet to say, this man is a sexual deviate.

Q. Could I ask you this question, Doctor; I copied down an extremely brief definition of psychopathic personality, and I would like to read it, and ask you whether it is a fair definition, according to the traditional medical terms, rather than the Government regulations which you follow, which
71 reads as follows: One who, though possessing normal intelligence, is or becomes personally, through hereditary or congenital conditions, constitutionally lacking in moral sensibility, in emotional control and the inhibition of will. Would you say, Doctor, that is more or less the standard definition of psychopathic personality?

A. That is fair enough.

Q. And, in that definition, it does have the constitutionally lacking, so as I understand the definition, there must be different constitutional disorders in order for a person to fit within that category; is that also true, would you say?

A. That is fundamentally true.

Q. And, I believe you said a minute ago, you would agree, according to traditional medical terms, Mr. Fleuti, would not be considered a psychopathic personality?

A. I have no strong feeling in that regard. May I read from this Manual in regard to the definition of psychopath; the legal term, psychopathic personality is equivalent to the medical designation, "personality disorder" which may be broadly defined as follows: These disorders are characterized by development defects or pathological trends in the personality structure, with minimal subjective anxiety and little or no distress. In most instances the disease is manifested by a lifelong pattern of action or behavior (acting out) rather than by mental or emotional symptoms.

Q. And, that is the definition which you follow in Mr. Fleuti's case; is that correct?

A. With this exception; immediately under this is paragraph (b), and once again, I quote: Under this legal category, will be classified those applicants who are diagnosed as sexual deviates.

Q. And, the portions of the regulations which you have just read; those constitute the criterion which you follow in evaluating Mr. Fleuti?

A. They would.

Q. And, you follow no other medical definitions or standards; is that correct?

A. We have admission, certified record of sexual deviation, and on that ground, this was so classified under the second paragraph in Chapter 6, Page 5.

72 Q. Your answer then would be yes, to my question, I believe. Perhaps I could rephrase the definition which you just read from the regulations; that is, the criterion which you used exclusively in evaluating Mr. Fleuti; is that correct?

A. Fundamentally, yes.

Q. Perhaps I could ask you this. Would you resort to some other definition or terms in addition to those in evaluating Mr. Fleuti?

A. Would I resort?——

Q. Would you make use of any other definitions or terms?

A. All words are terms; not when we have fellatio, copulation, oral fellatio; certainly we resort to what we know.

Q. I was not trying to trick you; I was trying to make sure the definition you read, you followed to the exclusion of any other definition in making these reports.

A. First of all, the point I am trying to review is this; we all agree, this is a case of sexual deviation; is that correct?

COUNSEL:

Well, I understand what you say; yes, sir.

WITNESS:

If it is not clear, allow me to read from your own psychiatric report.

COUNSEL:

I have read that; I am not trying preclude all points.

WITNESS:

For all orderly process; we must in some way classify this man—Class A, B, or C, or no classification, and to get a classification that is acceptable to all concerned, we must have to say this is a Class A disease, consequently, we have to give—is this a physical disease, a bacterial disease, or what? No, it is a psychiatric disease. Then we have to pigeonhole it under the regulation, psychopathic personality.

COUNSEL TO WITNESS:

Q. Just one further question, Doctor. Was there any other doctor who worked with you in the examination?

73 A. This manual states that in a Grade A disorder, two physicians, if available, shall sign this report; therefore, when the evidence so indicated this would be a Class A disease, my associate, at that time, Dr. Gunther Schmitt, made an independent brief examination and signed that report.

Q. I take it, your evaluation was based purely on your own findings; then, possibly what Dr. Schmitt might have told you; is that correct?

A. I saw Mr. Fleuti before Dr. Schmitt.

Q. Is the answer to the question, yes, the evaluation made by you was based on your findings?

A. Yes, history and documentary evidence, findings.

COUNSEL:

I believe that is all.

INQUIRY OFFICER TO EXAMINING OFFICER:

Any redirect, Mr. Lay?

EXAMINING OFFICER:

No, sir.

INQUIRY OFFICER TO WITNESS:

Q. Doctor, you stated in the first part of this examination, your certification was prepared by a clerk; was that done under your direction and supervision?

A. Technically, it is, when I say clerk, this was prepared by Ruth Hamataka, and as the written subscript indicates; she has more than one designation; she is actually the supervisor of a clerk and a medical stenographer.

Q. You dictated it and had the report prepared under your direction?

A. That is correct.

INQUIRY OFFICER TO COUNSEL:

Q. Anything further of the witness?

A. Nothing further.

74 INQUIRY OFFICER TO EXAMINING OFFICER:

Anything further?

EXAMINING OFFICER:

Nothing further.

INQUIRY OFFICER TO EXAMINING OFFICER:

Any further questions of the respondent?

EXAMINING OFFICER:

No further questions.

INQUIRY OFFICER TO COUNSEL:

Any further questions or evidence?

COUNSEL:

No further questions or evidence.

INQUIRY OFFICER TO RESPONDENT:

As soon as possible, I will prepare a decision and order in this case, disposing of the matter, a copy of which will be served on your attorney, Mr. Porter, and you will be allowed ten days to make an appeal, file any exceptions, or submit a brief or argument in the matter.

INQUIRY OFFICER:

Hearing closed.

HEARING CLOSED

I certify: That to the best of my knowledge and belief, the foregoing transcript is a true and correct report of everything that was stated during the course of the hearing, excluding statements made off the record. (9–4–59.)

Edythe D. Marusa,
EDYTHE D. MARUSA,
Reporter-Stenographer.

70 *George Fleuti vs.*

75 *Exhibit 4*

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

UNITED STATES OF AMERICA:

File No. A8 382 498

In the Matter of

George Ernst Marcel FLEUTI

Respondent.

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

ADDITIONAL CHARGES OF DEPORTABILITY

To: George Ernst Marcel Fleuti
305 North Montgomery
Ojai, California
(address)

There is hereby lodged against you the additional charge(s) that you are subject to be taken into custody and deported pursuant to the following provision(s) of law:

Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens afflicted with psychopathic personality, under Sec. 212(a)(4).

In support of the additional charge(s) I am to submitted the following factual allegation(s) in addition to those set forth in the order to show cause and notice of hearing:

(See Continuation Sheet attached hereto and made a part hereof)

EXHIBIT " 4 " AUG 5 1959 BJK

August 5 1959
Date

Richard E. [illegible]
Officer

Form I-261
(6-18-57)

GPO 974970

76

(Continuation Sheet) AG 332.14/8

admits 6. You were examined by a Medical Officer of the United States Public Health Service at Los Angeles, California on June 18, 1959;

admits 7. You were certified by an official of that Service, on that date, as being afflicted with "Class A Psychopathic Personality";

admits 8. That official further certified on that date, that this "condition existed prior to and at time of entry (August 1956)";

denies 9. You have been afflicted with the desire for sexual relations with members of your own sex for approximately the past twenty-two (22) years;

denies 10. You have indulged in the practice of sexual relations with members of your own sex at periodic intervals, averaging about once a month, for the past twenty-two (22) years.

AUG 5 1959
EXHIBIT " 4 "

George Fleuti vs.

Exhibit 5

PHS-12a
REVISED

CLASS ___ MEDICAL CERTIFICATE

STATION USPHS, Los Angeles, Calif. DATE 6-18-59

NAME FLEUTI, George Ernst Marcel

AGE	SEX	DATE OF ARRIVAL
46	M	

PORT OF ARRIVAL

CARRIER (Identifying marks)

CLASS Class A | MANIFEST NO ___ LINE ___

The above-described person has this day been examined and found to be afflicted with (diagnosis, including statutory classification when applicable):

Class A Psychopathic personality

Condition existed prior to and at time of entry (August 1956).

Type of disease or defect, or organ affected (when appropriate):

Substantiating data:

1. Laboratory reports: SEROLOGY 6-18-59: VDRL -Neg.

URINALYSIS 6-18-59: Specific Gravity 1.007; Albumin-0; Sugar-0

2. Other medical data, including results of special diagnostic procedures:

CHEST X-RAY 6-18-59: Essentially normal

EXHIBIT "5" AUG 5 1959 RJK

EXAMINERS:

NAME: A. R. DaMigren TITLE

A.R.DaMigren, Sr.Surg.(R)
U. S. Public Health Service
424 Federal Bldg., 312 N.Spring
Los Angeles 12, Calif.

/rh

78 Exhibit 5

Form FS-248 (May 1958) EDITION OBSOLETE

UNITED STATES OF AMERICA

MEDICAL EXAMINATION OF VISA APPLICANTS

PLACE: LOS ANGELES, CALIF. DATE: June 18, 1959

At the request of the American Consul at Los Angeles, Calif. File # 3-82 428

I certify that on the above date I examined GEORGE ERNEST MARCEL FLEUTI AGE 46 SEX M

I examined specifically for evidence of any of the following conditions:

CLASS A:

TUBERCULOSIS (in any form)

LEPROSY (Hansen's Disease)

DANGEROUS CONTAGIOUS DISEASES

- Actinomycosis
- Amebiasis
- Blastomycosis
- Chancroid
- Favus
- Filariasis
- Gonorrhea
- Granuloma Inguinale
- Keratoconjunctivitis Infectious
- Leishmaniasis
- Lymphogranuloma Venereum
- Mycetoma
- Paragonimiasis
- Ringworm of scalp
- Schistosomiasis
- Syphilis, infectious stage
- Trachoma
- Trypanosomiasis
- Yaws

MENTAL CONDITIONS:

- Feeble-mindedness (mental deficiency)
- Insanity
- Previous occurrence of one or more attacks of insanity
- Psychopathic personality
- Epilepsy (Idiopathic)
- Mental defect
- Narcotic drug addiction (Chronic alcoholism (See proviso, sec 34 USPHS Reg.)

CLASS B:

Physical Defect, Disease, or Disability Serious in Degree or Permanent in Nature Amounting to a Substantial Departure from Normal Physical Well Being.

CLASS C:

Minor Conditions.

(Check number (1), below or complete number (2))

My examination, including the X-ray and other reports below, revealed:

(1) No defect, disease, or disability ...

(2) Defect, disease, or disability, or previous occurrence of one or more attacks of insanity, as follows (give class—A, B, or C—diagnosis, and pertinent details*)

Class A Psychopathic personality

Condition existed prior to and at time of entry (August 1956).

Chest X-ray report 6-18-59: Essentially normal from Dr.

Blood serological report 6-18-59: VDRL Test - Negative from Dr.

Urinalysis report 6-18-59: Specific Gravity 1.007; Albumin-0; Sugar-0

EXHIBIT # 5 1959 AUG 5

SIGNATURE OF MEDICAL EXAMINER: L.K. Dahlgren, Sr. Surg. (R), U.S. Public Health Service
424 Federal Bldg., 312 N. Spring, Los Angeles 12, Calif.

*Continue on reverse side if necessary

FS-248

80 . . . *Exhibit 6*

Form I-215a
U. S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
(12-17-54)

IMMIGRATION AND NATURALIZATION SERVICE
RECORD OF SWORN STATEMENT IN AFFIDAVIT FORM

AFFIDAVIT

IN RE: GEORGE ERNST MARCEL FLEUTI . . . FILE NO. A-8 382 428
EXECUTED AT Ventura, California . . . DATE March 25, 1959

Before the following officer of the U. S. Immigration and Naturalization Service:

Herbert B. Perkins . . . (IN ENGLISH)

I, GEORGE ERNST MARCEL FLEUTI, acknowledge that the above-named officer has identified himself to me as an (Acting) Investigator of the United States Immigration and Naturalization Service authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. I desire to make a sworn statement before him in the above-named case. I understand that any statement which I make must be freely and voluntarily given and that it may be used by the Government as evidence in any proceedings against me or any other person. Being duly sworn, I make the following statement freely and voluntarily: that my true and correct name is GEORGE ERNST MARCEL FLEUTI, and I am a citizen of Switzerland. I was born at Bex, Switzerland, on July 5, 1912. I have never become a citizen of any country other than Switzerland.

I lived in Canada for about ten months before I came to live in the United States. I believe I landed in Canada, about December, 1951, then I came to live in the United States on October 9, 1952. I secured an Immigration Visa to live in the United States - I obtained that visa in Montreal, Canada. After that, I was admitted to the United States at Rouses Point, New York, on October 9, 1952.

Since that time, I have only been outside of the United States one time. I visited Mexico - Ensenada, I believe, and returned to the United States the same day. I returned to the United States at San Ysidro, California, about August, 1956. I am not too sure of the date, but it was about August, 1956. At that time, I presented my green Alien Registration Card, and was allowed to return to the United States.

I live at 305 North Montgomery Street, Ojai, California, and I work as a desk clerk at the Ojai Valley Inn, Ojai, California. I have Social Security Card Number 062-26-1286. I have worked at that same place for about five years now. I have lived at the same house on Montgomery Street, for about three and a half months. YEARS I live there alone.

I am single, have never been married, and have no children. I have cousins and an uncle here in the United States, but have no closer relatives here, and no one dependent on me for their support.

I have never been arrested for any offense of any kind in Canada, or Switzerland, but I have been arrested here in the United States three times; two times in Los Angeles, California, and one time in Oxnard, California. Both arrests in Los Angeles, were because I ~~indulged in homosexual relations with another man~~. I do not remember the dates exactly, but for the first arrest, I believe I was fined $100.00; for the second arrest, I was fined $200.00. I was not sentenced to jail either time, but naturally I had to remain in jail until I could get bail. The

of homosexual nature

EXHIBIT NO. 6
AUG 5 1959 DATE

81

SWORN STATEMENT OF GEORGE ERNST MARCEL FLUTI (Cont'd.)

third arrest was only on suspicion, and I was not convicted - the Court dismissed the case against me, so I was not fined.

I was the positive one, when I was arrested by the Los Angeles Police on the second arrest - by that, I mean that the other man copulated my private part. I did not do that for him.

I suppose I began to get those urges when I was about twenty years of age - while I was still living in Switzerland. I know that I did not get the urge when I was in my teens - I had no interest in such things then; it was later while I was already working in hotels in all parts of Switzerland. I had friends there who felt the same way, and we would copulate the private parts of each other. Some of the time, I was the positive one, and on other occasions, I would be the negative one - the one who would take the private part of the other man in my mouth. I do not know how often I performed such acts once they began, but I suppose it was when ever the opportunity would present itself, and one of my friends felt the same way at the same time.

In Canada, I did not have any such friends - I suppose that I did not live there long enough, but after I came to live in the United States, I ran across men who felt like I do, and we would copulate each other. Again, I can not say how often I would do such an act, but I suppose it was when ever the opportunity presented itself. As for frequency, I suppose I had such a homosexual act about once a month, maybe a little less than one time a month. It is difficult to say how many times I had homosexual relations with a man, but I suppose it was a little less than one time a month. I said that the homosexual urges began when I was about twenty. I really believe that I was more like 24 years of age; I guess that I have been having such relations with men for about twenty two years. I know it did not start until after I went back to Switzerland from England, and I was living in England in 1936.

In Switzerland, when ever I and one of my friends performed homosexual relations, we did it in a ~~hotel room~~, or an apartment. We, or I, was never caught, or arrested. In Los Angeles, I was unfortunate enough that I did it in a Park, and was arrested. Ever since that second arrest in Los Angeles, I have felt that the United States Immigration might be looking for me because I heard that such things were reported to Washington, so I have been very careful.

It has been explained to me that I might be considered illegally within the United States because of my homosexual relationships over the past years. I do not wish to leave the United States voluntarily, but ask that I be allowed a formal deportation hearing.

I have read the foregoing two pages of testimony and I understand it. I have placed my initials near any corrections that have been made. I certify that what is written is the truth and as I have stated while under oath to tell only the truth.

George Fluti

Read, signed, and sworn to before me at Ventura, California, on March 25, 1959.

EXHIBIT "6" BTK. Aug 5 1959

Herbert B. Parker
Investigator

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA 12698

The People of the State of California, PLAINTIFF,
vs.
GEORGE N. FLEUTI DEFENDANT.

Booking No. 5473

COMPLAINT

THIS CERTIFIED COPY IS GIVEN FREE OF CHARGE PURSUANT TO LAW SOLELY UPON THE CONDITION THAT IT IS TO BE USED FOR OFFICIAL BUSINESS.

Personally appeared before me, the undersigned, who, first being duly sworn, complains and says: That on or about AUG 23 1953, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit:

VIOLATION of Subsec 5 of Section 647 of the Penal Code of the State of California

was committed by GEORGE N. FLEUTI

(whose true name to affiant is unknown), who at the time and place last aforesaid,

was wilfully and unlawfully a lewd and dissolute person.

All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant that he may be dealt with according to law.

Subscribed and sworn to before me on AUG 24 1953

W. E. Hogue
W. E. HOGUE

URBAN P. HOGUE, Clerk of the Municipal Court of Los Angeles Judicial District, in said County and State.

By P. Parsons (SEAL) Deputy Clerk

JAN 29 1959

Edith Peters

EXHIBIT # 7 BMK AUG 5 1959

83 *Complaint*

Filed Aug. 24, 1953. Urban F. Emme, Clerk of the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. By B. Persons, Deputy Clerk. Issued by Roger Arnebergh, City Attorney, J. L. Denny. By J. L. Denny, Deputy City Attorney.

MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

GEORGE N. FLEUTI

Defendant.

No. 10,581

AUG 24 1953 $500.00 surety bond posted.

AUG 24 1953 Complaint filed sworn to by W. E. Vogle charging the Defendant with having on August 23, 1953, at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit:

VIOLATION SUB 5 SECTION 647 PENAL CODE

AUG 24 1953 Cause called. Judge John D Barnes presiding. Both parties ready. People represented by J. Denny, (D.C.A.) Defendant represented by G. Levie, Deputy to court, this arraigned, informed of the charge against him and of his legal rights. Defendant gives true name as charged and asks time to plead. Ordered to appear and plead August 27, 1953, at 1:30 P.M. Bail up to stand.

AUG 27 1953 Cause called. Judge G Barnes presiding. Both parties ready. People represented by J. Denny, (D.C.A.) Defendant in Court and represented by G. Levie.

Defendant in court and enters his plea of not guilty of the offense charged. People and defendant with counsel in open court each personally waives jury trial.

Stipulate to try case on Police Report. Defendant adjudged guilty. Defendant waives time of sentence.

Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court that for the said offense of Violation of Sub 5 section 647 P. C. the said defendant be fined in the sum of 100 dollars and that in default of the payment of said fine on or before 5 O'clock P. M. of August 27, 1953, the said Defendant be imprisoned in the City Jail of said Los Angeles City in the proportion of one day's imprisonment for each and every 5 dollars of said fine until the said fine be wholly satisfied not exceeding 20 days, and that the defendant be discharged on payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed.

Fine $100.00 paid #17110.

Bail ordered exonerated.

Per section 290 Penal Code Notice sent to Sacramento.

I hereby certify that the above and foregoing is a full, true and correct copy and transcript of the docket in the within named cause.

JAN 28 1959

GEORGE J. HARBOUR
Clerk of Municipal Court of Los Angeles Judicial District
County of Los Angeles, State of California

By _____ Deputy

EXHIBIT # 7 AUG 1959

85 No. 16,581, Div. 30

Municipal Court of Los Angeles Judicial District

County of Los Angeles, State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

GEORGE M. FLEUTI, DEFENDANT.

TRANSCRIPT OF DOCKET

86 *Counsel's Note Re Exhibit 8*

This exhibit, being a letter dated August 10, 1959, from David R. M. Harvey, M.D., to Richard F. Porter, Esq., Attorney at Law, is the same as "Exhibit 'A'" to the plaintiff's Complaint for Declaratory Judgment in the district court, which exhibit appears at pages 6-10 of this record. It is accordingly omitted from the print at this point.

87 UNITED STATES DEPARMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

SEPTEMBER 22, 1959.

File No. A8 382 428—Los Angeles

IN RE GEORGE ERNST MARCEL FLEUTI

IN DEPORTATION PROCEEDINGS

In behalf of respondent: Richard F. Porter, Esq. 202 North Hawthorne Boulevard, Hawthorne, California.

In behalf of the service: Richard L. Lay; Examining Officer (Los Angeles, California).

Charges: Order: Sec. 241(a)—I&N Act—Excludable at time of entry under Sec. 212(a)(9) of the Act—Conviction of a crime involving moral turpitude, to wit: Sex perversion. Lodged: Sec. 241(a)(1)—I&N Act—Excludable at time of entry under Sec. 212(a)(4) of the Act—Afflicted with psychopathic personality.

Application: Voluntary departure in lieu of deportation.

Order to show cause served: April 7, 1959.

Discussion: The respondent appeared before me in a hearing in deportation proceedings on April 20, 1959, and admitted as being true all of the factual allegations contained in the order to show cause and that he was subject to deportation on the charge set forth in the order. On the basis of these admissions a summary order of deportation was issued the same date.

On July 6, 1959, the Examining Officer for the Government moved to reopen the proceedings for the submission of additional evidence bearing on the issue of deportability, and the motion was granted by the Special Inquiry Officer on July 22, 1959.

88 The certified copy of the Information filed in the criminal proceedings relating to the respondent's conviction as alleged in allegation No. 5 in the order to show cause and admitted as being true recites that he was charged with *a* violation of Section 288a of the Penal Code of California, a *felony* (underscoring supplied), and a certified copy of the plea of guilty and judgment also refers to the offense charged as a felony (Ex. 2). In the motion to reopen the Examining Officer concedes that the foregoing conviction was for a misdemeanor and not a felony; that by reason of the punishment actually imposed such misdemeanor was classifiable as a petty offense and consequently the respondent was not subject to exclusion at the time of his last entry into the United States at San Ysidro, California, during August 1956 by virtue of the exemption from excludability provided for in Section 4 of the Act of September 3, 1954. The Special Inquiry Officer agrees with this conclusion for reasons which will be more fully set forth below.

Section 17 of the Penal Code of California defines a felony and a misdemeanor as follows:

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

Section 288a of the Penal Code provides among other things that an offender may be punished by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year. Under certain circumstances, not present in this case, the punishment is mandatory that imprisonment shall be in the state prison for not less than three years. The judgment of the court (Ex. 5) shows that the respondent was sentenced to pay a fine of $200 within one week or serve one day in the county jail for each five dollars of said crime not paid. The fine was paid and he did not serve any term of imprisonment. It is clear that under the provisions of Section 17 of the Code the offense for which he was convicted must be considered a misdemeanor.

89 It having been found that he was convicted of a misdemeanor only, it must be determined if he is eligible for consideration under the provisions of Section 4 of the Act of September 3, 1954, as having committed an offense which is a misdemeanor classifiable as a petty offense under the provisions of Section 1(3) of Title 18, United States Code, by reason of the punishment actually imposed, and if he has committed only one such offense. If these questions are answered in the affirmative, then he would not be deportable on the charge contained in the order to show cause as an alien excludable at the time of entry under the provisions of Section 212 (a)(9) of the Immigration and Nationality Act because of conviction of a crime involving moral turpitude. The words of condition in the statute, "* * * provided, that the alien has committed only one such offense," are deemed to relate back and to mean only another offense which would, because of its commission, render the alien excludable. It follows that such other offense must necessarily involve moral turpitude, otherwise it would not constitute a ground of excludability.

Section 1(3) of Title 18, United States Code, provides:

"Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

The evidence of record shows that the respondent was also convicted in the Municipal Court, Los Angeles, California, on August 27, 1953, for violation of subdivision 5 of Section 647

of the Penal Code in that he was wilfully and unlawfully a lewd and dissolute person. He was sentenced to pay a fine of $100 or serve one day's imprisonment for each five dollars of the fine. The fine was paid (Ex. 7). It has been held that such an offense is not a crime involving moral turpitude (Matter of G– R–, 5 I&N Dec. 18).

It is concluded that the offense for which the respondent was convicted on March 9, 1956 (violation of Section 288a of the Penal Code) was a misdemeanor classifiable as a petty offense, and as he has not admitted the commission, or been convicted of more than this one crime which involves moral turpitude, he is not deportable on the charge contained in the order to show cause.

There was subsequently lodged in the proceeding the additional charge that he is subject to deportation pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act in that at the time of entry he was excluda-
90 able under Section 212(a)(4) of the Act as an alien afflicted with psychopathic personality (Ex. 4). He denied in the reopened hearing the truth of the lodged allegations Nos. 9 and 10, which alleged that he had been afflicted with the desire for sexual relations with members of his own sex for approximately the past 22 years and that he had indulged in the practice of sexual relations with members of his own sex at periodic intervals, averaging about once a month, for the past 22 years. He admitted the truth of the lodged allegations Nos. 6, 7 and 8 to the effect that he was examined by a medical officer of the United States Public Health Service at Los Angeles, California, on June 18, 1959; that he was certified by an official of that Service on that date as being afflicted with "Class A Psychopathic Personality;" and that this official further certified on that date that this condition existed prior to and at the time of entry in August 1956.

In a sworn statement made to an Immigration Officer at Ventura, California, on March 25, 1959 (Ex. 6) he admitted having engaged in homosexual acts on many occasions for about 22 years, both before and after his arrival in the United States, but that he had never been arrested for such conduct until he committed such an act in a public park in Los Angeles,

California. Since his second arrest he has taken precautions not to be caught, because he believed that if he were, he would be in difficulty with the Immigration authorities. These admissions of the respondent have not been controverted. He admitted that he had read this statement before signing it and that he had testified truthfully. An objection to the statement's introduction in evidence was overruled (8 C.F.R. 242.14 (c)). He also denied deportability on the additional charge lodged in the reopened hearing.

On June 18, 1959, he was certified by a United States Public Health Service Senior Surgeon as being afflicted with a Class A condition, Psychopathic Personality, and that this condition existed prior to and at the time of his entry into the United States in August 1956 (Ex. 5). This certification was based upon a personal examination and interview of the respondent by the medical officer who prepared it. There was no substantial fact or facts developed in cross-examination of this medical officer that would tend to disprove his finding that the respondent was at the time of entry a psychopathic personality. In fact, a report of examination by the respondent's own psychiatrist conducted on May 20, June 22, July 8, and August 7, 1959, shows that his condition was diagnosed as "Sexual deviation, homosexuality, now under control (Ex. 8 f. 91 . This report further recites that his deviation is not sufficient to justify the diagnosis of psychopathic personality and that he is not a danger to any other person. This last conclusion and references in the report to the California Code regarding sexual psychopaths are not relevant to the deportation charge.

The term "psychopathic personality" is a legal term and is equivalent to the medical designation of "personality disorder." It also covers disorders other than those manifested by a sexual deviate, although the latter must be classified as a psychopathic personality (United States Public Health Service Manual for Medical Examination of Aliens, Part II, Chapter 6, Section A, Paragraph 6).

The question of whether homosexuals or sex perverts are persons of psychopathic personality has been thoroughly and exhaustively discussed in the decision of the Board of Immi-

gration Appeals in Matter of P–, 7 I&N Dec. 258. The facts in that case are closely analogous to the present case. In Matter of P– the Board found that the excluding provisions of Section 212(a)(4) of the Immigration and Nationality Act relating to persons of psychopathic personality include homosexuals and sexual perverts and that the respondent's admissions, of homosexual tendencies and homosexual acts prior to entry plus the certification, based on those admissions, of the United States Public Health Service that he was a person of psychopathic personality was sufficient to support a finding of deportability under Section 241(a)(1) of the Act as having been excludable at the time of entry as a person afflicted with psychopathic personality. In this connection see also U.S. v. Flores-Rodriguez, 237 F. 2d 405, (2 Cir. 1956).

It is concluded on the basis of all of the evidence of record and the cited cases that the charge lodged at the reopened hearing is sustained.

DISCUSSION AS TO ELIGIBILITY FOR DISCRETIONARY RELIEF: The respondent is a 47-year-old single male, a native and citizen of Switzerland. He has never been married. He was admitted to the United States for permanent residence at Rouses Point, New York, on October 9, 1952, and except for a one-day visit to Ensenada, Mexico, in August of 1956, he has resided continuously in this country since that entry. He is and has been for several years past employed as a hotel desk clerk. The Special Inquiry Officer, after carefully con-
92 sidering all of the facts and circumstances in this case, has concluded that this is not the type of case in which the discretionary relief of voluntary departure should be granted, and his application for voluntary departure will be denied as a matter of administrative discretion. He is not eligible for any other type of discretionary relief from deportation. He designated Switzerland as the country to which he desired to be deported if found subject to deportation and ordered deported from the United States.

Findings of fact: Upon the basis of all of the evidence of record it is found:

(1) That the respondent is an alien, a native and citizen of Switzerland;

(2) That the respondent last entered the United States at San Ysidro, California, in August 1956;

(3) That the respondent was lawfully admitted for permanent residence at Rouses Point, New York, on October 9, 1952;

(4) That at the time of the respondent's last entry into the United States he was admitted to this country as a returning resident alien;

(5) That the respondent was convicted in the Superior Court in and for the County of Los Angeles, State of California, on March 9, 1954, for violation of Section 288a of the Penal Code of California, committed on or about February 16, 1956, and for which offense he was sentenced to pay a fine in the sum of $200 within one week or serve one day in the county jail for each five dollars of said fine not paid;

(6) That on June 18, 1959, the respondent was examined by a Senior Surgeon of the United States Public Health Service at Los Angeles, California, and certified by that officer as being afflicted with a Class A condition, "Psychopathic Personality," which condition existed prior to and at the time of his entry into the United States in August of 1956.

Conclusions of law: On the basis of the foregoing findings of fact it is concluded:

(1) That under the provisions of Section 4 of the Act of September 3, 1954, the respondent was *not* inadmissible to the United States at the time of his last entry under the provisions of Section 212(a)(9) of the Immigration and Nationality Act because of a conviction of a misdemeanor which was classifiable as a petty offense under the provisions of Section 1(3) of Title 18, United States Code, by reason of the punishment actually imposed.

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(2) That under the provisions of Section 241(a)(1) of the Immigration and Nationality Act the respondent is not subject to deportation on the ground that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude, under Section 212(a)(9) of the Act: Sex perversion;

(3) That under the provisions of Section 241(a)(1) of the Immigration and Nationality Act the respondent is subject to

eportation on the ground that at the time of entry he was within one or more of the classes of aliens excludable by the aw existing at the time of such entry, to wit, aliens afflicted vith Psychopathic Personality, under Section 212(a)(4) of the ct.

Order: It is ordered that the respondent be deported from United States in the manner provided by law on the lodged rge only.

Bert F. Kearney,
BERT F. KEARNEY,
Special Inquiry Officer.

BFK: cgr.

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

NOVEMBER 20, 1959.

File: A-8382428—Los Angeles

IN RE GEORGE ERNST MARCEL FLEUTI

IN DEPORTATION PROCEEDINGS—APPEAL

On behalf of respondent: Richard F. Porter, Esquire, 202 orth Hawthorne Boulevard, Hawthorne, California.

Charges: Order: Section 241(a)(1), Act of 1952 (8 USC 251(a)(1))—Excludable at time of entry under Section 212)(9) of the Act (8 USC 1182(a)(9))—Convicted of a crime olving moral turpitude, to wit, sex perversion. Lodged: tion 241(a)(1), Act of 1952 (8 USC 1251(a)(1))—Exclud- e at time of entry under Section 212(a)(4) of the Act (8 S 1182(a)(4))—Afflicted with psychopathic personality.

pplication: Voluntary departure.

he respondent, a 47-year-old alien, a native and citizen of tzerland, appeals from a decision on September 22, 1959 ecting deportation on the charge lodged in the proceedings, amely, that under Section 241(a)(1) of the Immigration and Nationality Act the respondent is deportable, in that, he was xcludable at time of entry in August 1956 under Section 212 a)(4) of the Act as an alien afflicted with psychopathic per- sonality. The charge in the Order to Show Cause, which is

assigned under Section 241(a)(1) of the Immigration and Nationality Act, alleging that the subject was excludable at time of entry under Section 212(a)(9) of the Act, as one convicted of a crime involving moral turpitude, to wit: sex pervision, has not been sustained.

Counsel excepts to the finding that the alien is deportable on the charge lodged in the hearing. He also excepts to the finding that the alien's application for voluntary departure should be denied (8 USC 1254(e)).

There have been a series of hearings in this case. Following the initial hearing the special inquiry officer ordered deportation on April 20, 1959. On motion presented by the examining officer on July 6, 1959, to reopen the hearing, an order was entered granting the motion on July 22, 1959. This appeal comes forward following the reopened hearing.

The respondent was admitted to the United States on October 9, 1952 at Rouses Point, New York for permanent residence. He last entered at San Ysidro, California during August 1956 as a legally resident alien returning to resume residence. Exhibit 2 in the record is a document showing the respondent's conviction in Los Angeles County, California on plea of guilty on March 16, 1956, to violation of Section 288a of the Penal Code of California (sex perversion, committed February 16, 1956). He was directed to pay a fine of $200, or to serve one week in jail for each five dollars of fine not paid. The fine was paid. The special inquiry officer has correctly found that the offense involves moral turpitude.

Exhibit 7 is a court record showing the respondent's conviction in the Municipal Court, Los Angeles County, California on August 27, 1953 for violation of subdivision 5 of Section 647 of the Penal Code of that state, in that, he was wilfully and unlawfully a lewd and dissolute person. He was sentenced to pay a fine of $100 or serve one day's imprisonment for each five dollars of the fine. The fine was paid (Exhibit 7). This crime does not involve the element of moral turpitude (Matter of G–R–, 5 I&N Dec. 18).

The special inquiry officer has decided that within the provisions of Section 17, California Penal Code, defining felonies and misdemeanors, the alien's conviction in 1956 may be classi-

fied as a misdemeanor within Section 1(3) of Title 18 USC. Since the conviction in 1953 does not involve moral turpitude, consideration under the provisions of Section 4 of the Act of September 3, 1954 (Public Law 770) is not precluded to wipe out the conviction in 1956 as a ground for deportation (Matter of C–, 6 I&N Dec. 331). Accordingly, the respondent was not excludable at the time of last entry as charged in the Order to Show Cause. As previously stated, that charge has not been sustained.

96 The order for deportation is based on the charge lodged in the reopened hearing. The special inquiry officer has carefully set forth the evidence supporting such charge. The evidence consists of a medical certification, the testimony of a physician of the United States Public Health Service, the court records of two convictions, and a statement by the respondent's private physician-psychiatrist. The special inquiry officer has made specific findings and conclusions relative to the charge on which the deportation order is based.

Counsel alleges that the Government has not shown by preponderance of the evidence that the respondent is deportable. With respect to that allegation, counsel disagrees with Finding of Fact No. 6, namely, that on June 18, 1959 the respondent was certified by a senior surgeon of the United States Public Health Service as being afflicted with a Class A condition, "psychopathic personality", which condition existed prior to, and at the time of last entry in August 1956. The medical certificate and the testimony of the certifying physician are evidence which, in part, establishes that the respondent was excludable at time of last entry (p. 26 and Exhibit 5).

In adjudicating the issue of deportability in this, an expulsion proceeding, all of the relevant evidence pertaining to the question in issue may be considered. In summarizing the evidence, relating to the allegations in the lodged charge herein, the special inquiry officer has discussed all of the evidence consisting of the medical certification (Exhibit 5), the admissions made by this subject to a Service investigator under oath on March 25, 1959 (Exhibit 6), the court records showing criminal convictions (Exhibits 2 and 7), and other testimony and statements. Aside from the court records of criminal convic-

tions for improper sexual behavior during the past six years (Exhibits 2 and 7), which cannot be disputed by the respondent, the alien who is age 47 years has admitted that he has had homosexual urges (the urge to commit homosexual acts with men) since he was age 20 years; and that he has committed acts of sex perversion, intermittently and frequently for a period of 22 years (Exhibit 6).

The respondent's medical adviser, a psychiatrist, who has examined him on four occasions has diagnosed his condition as "sexual deviation, homosexuality, now under control" (Exhibit 8). The senior surgeon, United States Public Health Service, A. R. Dahlgren who gave the certification on
97 June 18, 1959, had before him at that time the alien's history including admissions of numerous acts of sexual relations with men. Dr. Dahlgren has testified in the reopened hearing and has submitted to cross examination. He has explained that the legal term, psychopathic personality, is equivalent to the medical designation "personality disorders" which may be broadly defined; and that they are characterized by development defects or pathological trend in the personality structure, with minimal subjective activity and little or no distress. In most instances the disease is manifested by a life-long pattern of action or behavior rather than by mental or emotional symptoms. He has also explained that within the definitions and the instructions set forth in the Manual for Medical Examination of Aliens the respondent's condition is diagnosed as sexual deviation (Part II, Class A condition, Chapter 6, Section A, 6, Manual for Medical Examination of Aliens) (pp. 30–34 inclusive and Exhibits 5, 6).[1]

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[1] 6. Psychopathic personality.

a. The legal term "psychopathic personality" is equivalent to the medical designation "personality disorder," which may be broadly defined as follows: "These disorders are characterized by developmental defects or pathological trends in the personality structure, with minimal subjective anxiety and little or no distress. In most instances, the disorder is manifested by a life-long pattern of action or behavior (acting out), rather than by mental or emotional symptoms". An example of such a certificate is Class A, Psychopathic personality, Inadequate personality.

b. *Under this legal category will be classified those applicants who are diagnosed as sexual deviates.* In the medical examination of aliens this

We find that the alien's admissions, the testimony of a physician and his medical certification, and court documents in this record, undisputed, places the respondent's condition within the allegations set forth in the charge lodged in this hearing. We further find that such affliction or condition existed at time of his last entry and constituted a ground of excludability. We do not find from the fact that the respondent is receiving treatment by Dr. R. M. Harvey, a psychiatrist, who is of the opinion that the condition may be controlled if the alien is under the supervision of a psychiatrist, is in any way in conflict with the medical findings of Dr. A. R. Dahlgren on June 18, 1959. Nor do we find that treatment and control of the affliction now is a defense to a finding of deportability. The contentions of counsel are without merit. The allegations in the charge upon which deportability is based are supported by reasonable, substantial and probative evidence.

98 The special inquiry officer has denied an application for voluntary departure as a matter of administrative discretion. This means that, although the respondent may meet all the requirements for the relief he seeks, his request for relief has been denied as a matter of discretion. Under the factual situation, the Board has no jurisdiction to change the decision of the special inquiry officer, with regard to the exercise of discretion, unless there have been mistakes, errors, prejudice or abuse of discretion. Our careful review of the proceedings reveals no basis for change of the special inquiry officer's decision. The appeal will be dismissed.

Order: It is ordered that the appeal in this case be dismissed.

THOS. G. FINUCANE, *Chairman.*

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is a difficult diagnosis to establish. However, the examiner should assist the consular officer when possible in evaluating an applicant thought to come in this category.

102 In United States Court of Appeals for the Ninth Circuit

No. 17,325

GEORGE FLEUTI, APPELLANT-PETITIONER

v.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA, APPELLEE-RESPONDENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Opinion

April 17, 1962

Before CHAMBERS, HAMLEY and DUNIWAY, Circuit Judges

HAMLEY, Circuit Judge:

George Fleuti, a resident alien, was ordered deported by the Immigration and Naturalization Service on the ground that at the time of his entry he was a "psychopathic personality." Having exhausted his administrative remedies, Fleuti brought this action in the district court to review that order. The district court entered judgment upholding the order of deportation, and Fleuti appeals.

For the reasons indicated in the margin we consider the case as before us for initial review, pursuant to 8 U.S.C., § 1105a, and 5 U.S.C., § 1031, et seq., rather than on appeal from a district court judgment.[1] Fleuti will be re-

[1] Section 5(a) of the Act of September 26, 1961, 75 Stat. 651, added a new section 106(a) to the Immigration and Nationality Act, 8 U.S.C., § 1105a. This new section provides that the procedure prescribed for the review of other federal agency orders (5 U.S.C., § 1031, et seq.) shall be the sole and exclusive procedure for the judicial review of deportation orders entered pursuant to section 242(b) of the Immigration and Nationality Act. Section 5(b) of the Act of September 26, 1961, provides that any judicial proceeding to review an order of deportation "which is pending unheard" in any district court on the effective date of that section (October 26, 1961), with exceptions not here relevant, shall be transferred for determination to the court of appeals having jurisdiction to entertain a petition for review under that section.

103 garded as the petitioner and George K. Rosenberg, District Director of Immigration and Naturalization Service, Los Angeles, as respondent. Under the circumstances of this case our reviewing function is substantially the same as was that of the district court which initially reviewed the deportation order.

Fleuti contends that the order is invalid because not based upon reasonable, substantial and probative evidence. He further contends that execution of the order would violate the Due Process Clause of the Fifth Amendment because, as applied to him, the statute in using the term "psychopathic personality" is void for vagueness.

Fleuti is a native and citizen of Switzerland. He was admitted to the United States for permanent residence on October 9, 1952. He remained in this country until August, 1956, when he visited for a few hours in Ensenada, Mexico. He then re-entered as a returning resident alien and has remained in this country since then.

104 The charges upon which the deportation order is based were filed against Fleuti on August 5, 1959. It was alleged that Fleuti is deportable because, at the time of his 1956 entry, he was within a class of aliens excludable by the law existing at the time of such entry, namely aliens afflicted with "psychopathic personality." The statutes cited as authorizing deportation on such a showing are sections 241(a) and

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The case before us was disposed of by the district court prior to October 26, 1961, thus a transfer of the cause to this court under the statutory provision referred to above was not required at that time. We note, sua sponte, however, that Fleuti seeks to restrain the enforcement of a deportation statute on the ground, which we find substantial, that the statute is unconstitutional as applied to him. The case should therefore have been heard by a district court of three judges. 28 U.S.C. § 2282; Wolf v. Boyd, 9 Cir. 287 F. 2d 520.

But if we now remand the case because of failure to convene a three-judge court, it would become a judicial proceeding "which is pending unheard" before the district court. It would then be necessary for the district court to transfer the case back to us as provided in section 5(b) of the Act of September 26, 1961 referred to above. It follows that, to avoid circuity, this court should consider the case as having been so remanded and transferred back and therefore now before us as an initial judicial review pursuant to 8 U.S.C., § 1105a and 5 U.S.C., § 1031 et seq.

212(a)(4) of the Immigration and Nationality Act, 8 U.S.C., §§ 1251(a) and 1182(a)(4).[2]

It was not stated in the formal charges what specific physical or mental condition Fleuti had at the time of his 1956 entry which brought him at that time within the class of aliens afflicted with "psychopathic personality." Attached to the charges, however, was a sheet on which certain factual allegations were listed, as set out in the margin.[3] It is thereby indicated that the particular condition thought to bring Fleuti within the stated class was his alleged affliction with the desire for, and regular indulgence in, homosexual practices over a long period of years.

105

It is an established principle of federal adjudication that questions of constitutional law are not to be dealt with in advance of the necessity of deciding them. See Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 72. It would therefore at first blush appear that we ought to first consider Fleuti's contention that the deportation order is not based upon adequate evidence, on the theory that if this ques-

[2] Section 241(a) reads in part:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry: * * *"

Section 212(a)(4) reads in part:

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * * *

"(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect; * * *"

The quoted language of section 212(a)(4) was added to the statute on June 27, 1952, which was before Fleuti's first entry, but did not become effective until December 24, 1952, which was after that entry.

[3] You were examined by a Medical Officer of the United States Public Health Service at Los Angeles, California on June 18, 1959; you were certified by an official of that Service, on that date, as being afflicted with "Class A Psychopathic Personality"; that official further certified on that date, that this "condition existed prior to and at the time of entry (August 1956)"; you have been afflicted with the desire for sexual relations with members of your own sex for approximately the past twenty-two (22) years; you have indulged in the practice of sexual relations with members of your own sex at periodic intervals, averaging about once a month, for the past twenty-two (22) years.

tion is decided in his favor we need not reach the constitutional question which he poses.

The difficulty in following this course, however, lies in the fact that: (1) in order to determine whether the evidence is sufficient it is necessary to decide what is meant by "psychopathic personality"; (2) this term is not defined in the statute and respondent relies upon the legislative history in order to establish the meaning of the term;[1] but (3) if the statute, judged on its face and as applied to Fleuti, is void for vagueness, access may not be had to the legislative history in order to establish its meaning.[2]

106 It is therefore necessary for us to proceed at once to the constitutional question.

The question of whether a statute is void for vagueness most frequently arises in criminal prosecutions. In such cases the

[1] Arguing that the term was intended to include, among others, anyone who was a homosexual or sex pervert at the time of entry, respondent calls attention to S. Rept. No 1137, 82nd Cong., 2nd Sess. (1952). That report contains the following statement:

"Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class do not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."

[2] The doctrine of void-for-vagueness is premised in part on the fiction that all persons in fact know the contents of statutes. But this fiction does not extend to the point of assuming that all persons in fact know the relatively inaccessible legislative history of statutes. Thus it is uniformly held that in applying the doctrine, a federal statute must be judged on its face. See United States v. Harriss, 347 U.S. 612, 617; United States v. Spector, 343 U.S. 169, 171.

Once it is ascertained that the language of the statute is sufficiently definite to satisfy due process standards, the legislative history may become relevant. But the function of such history is not to provide support for an otherwise deficient law; rather it is to assist the court in best effectuating the legislative intent by possible construction and limitation of the statutory language. Hence, if the challenged class of offenses seems plainly within the terms of the statute, legislative history may be consulted to verify this conclusion. See Harriss, supra, at 618, 620-622.

[3] See 109 U. Pa. L. Rev. 67 for an extensive discussion of the vagueness doctrine in the Supreme Court.

underlying principle is said to be that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. United States v. Harriss, 347 U.S. 612, 617.

But the Supreme Court has also applied this principle in civil proceedings, and in so doing has expressly ruled that a criminal penalty need not be involved. See Small Company v. American Sugar Refining Company, 267 U.S. 233, 239, where the court said, referring to other decisions in which the principle had been applied:

"* * * It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."

In Jordan v. DeGeorge, 341 U.S. 223, the court examined for vagueness, a statute which had been invoked in ordering deportation of that appellant. The court stated that it would do so notwithstanding the fact that it was not a criminal statute.[1] In that case the deportation had been ordered because a proscribed event had occurred after the alien
107 entered this country, namely, "conviction in this country of any crime involving moral turpitude." The particular crime which was held to involve moral turpitude was conspiracy to defraud the United States of taxes on distilled spirits.

In the case before us, deportation has been ordered not because of any event occurring or act committed after Fleuti's last entry in August, 1956, but on the ground that, at the time of that entry, he was excludable as a "psychopathic personality."

However, in proving that, at the time of such entry, Fleuti was a "psychopathic personality" the Immigration and Naturalization Service has not relied exclusively upon evidence concerning Fleuti's condition prior to entry.[2] It presented evidence showing not only that Fleuti had regularly engaged

[1] It was held, as a result of that examination, that the particular statute there in question was not unconstitutionally vague.

[2] Nor was it required to, absent a question of statutory vagueness. See United States ex rel. Powlowski v. Day, 2 Cir., 33 F. 2d 267.

in homosexual practices prior to his first entry in 1952, but that he had continued such practices after that entry and also after his second entry in 1956.[9] The finding that he was a "psychopathic personality" at the time of the 1956 entry is therefore based in part upon post-entry behavior.

Insofar as the record reveals, continuance of homosexual practices after Fleuti entered this country in 1952, and again in 1956, was not compulsive, but was a matter of choice. It follows that if, by reason of vagueness, the statute failed to advise him that homosexual practices conclusively evidence a "psychopathic personality" Fleuti was substantially prejudiced. As in the case of a vague criminal statute, he would thereby be deprived of notice that unless he refrained from such conduct harsh results might follow.

108 While the post-entry conduct was not itself the ground of deportation, but was used as evidence of a pre-entry deportable condition, the prejudice would nevertheless be substantial. The examiner might have found the evidence of pre-entry homosexual practices sufficient to support a finding of "psychopathic personality." But whether such a finding would have been entered in 1959, based on pre-entry conduct prior to October 9, 1952, or whether on such facts a charge would even have been brought, is a matter of speculation.[10]

[9] This evidence consisted of Fleuti's acknowledged history of such practices from 1936 to 1959, and proof of two convictions obtained against him in the courts of California. One of these convictions, obtained in the Municipal Court of Los Angeles, under section 647(5) of the Penal Code of California, relating to lewd and dissolute persons, was for an act committed on August 23, 1953. The other, obtained in the Los Angeles Superior Court under section 288a of the Penal Code of California, relating to homosexual acts, was for an act committed February 16, 1956.

[10] It was originally sought to deport Fleuti, pursuant to sections 241(a) and 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C., §§ 1251 (a)(1), 1182(a)(9), as a resident alien who had been convicted of a crime involving moral turpitude. The conviction relied upon was one of those referred to in footnote 9 above. A summary order of deportation was issued on the basis of that charge. It was later set aside by the examining officer, however, on the ground that the conviction relied upon, being a misdemeanor classified as a petty offense, was not one for which deportation could be ordered, in view of certain exceptions contained in the Act. But at the same time that this deportation order was set aside, the administrative proceedings were reopened to receive and consider the new charge that Fleuti was a "psychopathic personality" at the time of his last entry.

The fact that the examining officer chose to rely heavily upon post-entry behavior is some indication that a charge might not have been filed, or a finding entered, on pre-entry behavior alone.

From what has just been said, it will be observed that, for the purposes of this discussion, we regard Fleuti's conduct between his entry in 1952 and his brief absence in 1956, along with his conduct after his re-entry in 1956, as post-entry behavior. If, during the years 1952 to 1956, Fleuti was prejudiced by reason of the vagueness of the statute, he may assert such prejudice now, notwithstanding his temporary leave taking in 1956. The prejudice occurred while he was a resident alien and his constitutional rights as such, acquired during that period, were not "washed out" by his afternoon visit to Ensenada, Mexico.

The question which remains to be decided is whether the deportation statute, in using the undefined term "psychopathic personality" is void for vagueness, as applied in this case."[11]

109 In determining whether a statute is vague in the constitutional sense, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Jordan v. DeGeorge, at page 231. Or, as stated in United States v. Harriss, 347 U.S. 612, 617, and United States v. Petrillo, 332 U.S. 1, 7, would persons of "ordinary intelligence" be able to know what the statute means.

It has already been pointed out (see note 5 above) that in determining whether a statute is void for vagueness, the statute must be judged on its face, without reference to legislative history. We are mindful of the fact that language which is otherwise vague may be made sufficiently certain by definitive construction, even though the language construed is found in other statutes. Jordan, supra at 227. However, at the time this post-entry conduct occurred, there was no decisional law as

[11] Following the technique employed by the Supreme Court in similar cases, we consider the question in the context of the case before us without undertaking to determine whether the statute is necessarily void for vagueness with regard to all possible applications. See Williams v. United States, 341 U.S. 97, 101; Jordan v. DeGeorge, 341 U.S. 223, 232.

to the meaning of the term as used in this or any other federal statute.[12]

Dr. A. R. Dahlgren, the Public Health Service surgeon who had certified that Fleuti was a "psychopathic personality," testified that he did so because the Public Health Service manual for medical examination of aliens required him to so certify anyone who is a sex deviate. Dr. Dahlgren, who is not a psychiatrist, did not consider whether Fleuti's condition was hereditary, congenital, environmental or otherwise. His
110 finding was merely that Fleuti was a sexual deviate and that "by the instructions which I must follow, I have to place these deviates in this category."[13]

Dr. David R. Harvey, Fleuti's attending psychiatrist, was of the opinion that Fleuti's deviation is not sufficient to justify the diagnosis of "psychopathic personality." He stated that the formal label for Fleuti's condition would be that of "sexual deviation, homosexuality, now under control."[14]

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[12] The term "psychopathic personality" was used in a Minnesota statute; however, the term was expressly and narrowly defined in the statute and such definition was further construed and limited by the Supreme Court of Minnesota. In the light of such definition and construction, the United States Supreme Court had no difficulty in holding that the statutory term, as there used, was not too vague and indefinite to constitute valid legislation. Minnesota v. Probate Court, 309 U.S. 270. However, the government is not in a position to argue that this case adds certainty or definiteness to the term as used in the Immigration Act, because Fleuti would clearly not be classed as a "psychopathic personality" under the Minnesota statute.

[13] Dr. Dahlgren further testified: "We have to use certain terminology—and the rest of the world may not agree with this terminology; we are so ordered, therefore we do. * * *" The doctor agree that a standard definition of "psychopathic personality" would specify that it be a "constitutional" disorder due to hereditary or coitgenital conditions, and stated that he had no "strong feeling as to whether, according to traditional medical terms, Fleuti would be considered a 'psychopathic personality.'"

[14] Dr. Harvey expressed this further opinion:

"* * * He (Fleuti) does not frequent homosexual hangouts, has no evident interest in youths, manifests no irresponsible trends, and has his main social contacts with respected members of the community. * * * His sexual drive—particularly at his age—is thought to be within his range of control, especially if he is under the supervision of continuing contact with a psychiatrist. * * * His deviation is not sufficient to justify the diagnosis of psychopathic personality. * * * I do not think that another psychiatrist with adequate training and experience will be likely to disagree with my findings."

It is apparent that these two doctors, confronted with the identical facts, applied different standards in determining whether Fleuti was a "psychopathic personality." Dr. Dahlgren, feeling himself bound by the Public Health Service Manual, applied the test of whether Fleuti was a sex deviate, apparently ending the inquiry at that point. Dr. Harvey, while not insisting upon a showing of hereditary or congenital condition, considered such additional factors as the extent of the deviation, its effect upon other habits and activities, and whether control over the practice had been manifested.[15]

111 It is not surprising that these two doctors gave widely varying meanings to the term "psychopathic personality." [16] Congress was content to let "psychopathic personality" stand for "homosexuals" and "sex perverts," because the Public Health Service advised it that the term is "sufficiently broad" to accomplish this.[17] But the Public Health Service itself considered the term vague, saying in a report which was before the Congress in 1952:

"Although the term 'psychopathic personality' is vague and indefinite, no more appropriate expression can be suggested at this time." [18]

The Public Health Service view that the term is "vague and indefinite" is confirmed by authoritative writers in this field. Expert opinions to this effect, collected at page 940, note 33 of the article referred to in note 15 herein, are quoted in the margin.[19]

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[15] According to most present-day psychiatrists, "psychopathic personality" is attributable to environmental factors, whereas the earlier view was that this condition was either hereditary or congenital. The term has always been understood as referring to a lifelong pattern of behavior in conflict with social norms but without accompanying guilt or anxiety. The medical authorities and writers who have expressed these views are collected in a Note and Comment, 68 Yale L.J. 931, at 935, note 10.

[16] It is not established that Dr. Dahlgren would have differed with Dr. Harvey, if he had felt free to express his own opinion as to the term, rather than feeling obliged to apply the Public Health Service definition.

[17] S. Rep. No. 1137, 82nd Cong. 2nd Sess. (1952).

[18] Report of the Public Health Service on the medical aspects of H.R. 2379, in H.R. Rep. No. 1365, 82nd Cong., 2nd Sess. 46-47 (1952).

[19] Noyes, Modern Clinical Psychiatry, 3d ed. 1941, 410: Psychopathic personality.

therefore appears that the medical experts called to
ly the term in this particular case are in disagreement
it means, the Public Health Service which asked
use the term concedes that it is "vague and indef-
authoritative writers state that there is confusion
disagreement as to its meaning.
sion is inescapable that the statutory term "psy-
ersonality," when measured by common under-
d practices, does not convey sufficiently definite
at homosexuality and sex perversion are embraced
ince this statutory term thus fails to meet the test
ed in determining whether a statute is vague in the
al sense, we hold that the statute is void for vague-
plied in this case. Enforcement of the order of de-
would therefore deprive Fleuti of the due process of

der of September 22, 1959 for the deportation of
euti is declared to be void, that order is hereby set
nforcement of the order is enjoined.
orsement omitted.]

nsidered by many to be a meaningless designation * * * not
any common agreement * * * as to classification or * * *

allinson, Psychopathic Personality, 90 J. Mental Sci., (1944)

conclusion, that seems warrantable is that, at some time or
some reputable authority, the term psychopathic personality
d to designate every conceivable type of abnormal character."
Diagnosis and Etiology of Psychopathic Personalities as
Our Time, in Current Problems in Psychiatric Diagnosis, (Hoch
983), 139, 154:
t, the diagnosis of a psychopathic personality is practically

xual Offenses and Treatment of Sexual Offenders in the United
xual Offenses, 500, 507, (Radzinowicz ed. 1957):
nsensus is impossible in the no-man's land of psychopathic per-

The Psychopathic Delinquent and Criminal by George N. Thomp-
A.C.P., 42:
n 'psychopathic personality' has been used in an extremely broad
merican psychiatry * * *. Loose usage of the term has caused
n thinking."

113 In United States Court of Appeals for the Ninth Circuit

No. 17325

GEORGE FLEUTI, APPELLANT

v.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION SERVICE, APPELLEE

Judgment

Filed and entered April 17, 1962

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is *reversed*, the order of September 22, 1959, for the deportation is declared to be void, that order is hereby set aside, and enforcement of the order is enjoined.

114 [Clerk's certificate to foregoing transcript omitted in printing.]

No. 248, October Term, 1962

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

GEORGE FLEUTI

Order allowing certiorari

October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA, PETITIONER

v.

GEORGE FLEUTI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit (R. 43),[1] reversing the order of a special

[1] "R." refers to the printed record in the court of appeals, to which has been appended, consecutively paginated, the transcript of the proceedings in that court. "Tr." refers to the transcript of respondent's deportation hearing; it is contained in the authenticated record of the deportation proceedings, which was received in evidence in the district court as "Exhibit A" to the motion by the Immigration and Naturalization Service for summary judgment (R. 18–19). The exhibit is being lodged herewith with the Clerk of this Court. "Ex." followed by a number refers to the numbered exhibits which were received in evidence at the deportation hearing. These are also contained in "Exhibit A".

inquiry officer of the Immigration and Naturalization Service directing respondent's deportation, pursuant to Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as an alien who was excludable by law at the time of his entry (Appendix C, *infra*, p. 47).

OPINIONS BELOW

The opinion of the court of appeals (R. 32–42; Appendix A, *infra*, pp. 20–32) has not yet been reported. The opinion of the district court (R. 19–21) is not reported. The opinion of the Board of Immigration Appeals appears in Appendix B, *infra*, pp. 33–38. The opinion, findings of fact, conclusions of law, and order of the special inquiry officer of the Immigration and Naturalization Service appear in Appendix C, *infra*, pp. 39–47.

JURISDICTION

The judgment of the court of appeals was entered April 17, 1962 (R. 43). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision of the Immigration and Nationality Act excluding from admission into the United States aliens "afflicted with psychopathic personality" is void for vagueness as applied to a homosexual, even though it appears that Congress used the statutory term with the purpose of covering sexual deviates.

STATUTES INVOLVED

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U.S.C. 1182(a)(4), provides in pertinent part:

> SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens * * * shall be excluded from admission into the United States:
>
> * * * * * *
>
> (4) Aliens afflicted with psychopathic personality * * *;
>
> * * * * * *

Section 241(a)(1) of the same Act, 66 Stat. 204, 8 U.S.C. 1251(a)(1), provides in pertinent part:

> SEC. 241. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> * * * * * *

STATEMENT

Respondent is a 50-year-old alien, a native and citizen of Switzerland (R. 4, 14). He is unmarried and without dependents (Ex. 6). He was admitted to the United States for permanent residence on October 9, 1952, and has been here continuously since that time, except for a brief visit to Ensenada, Mexico, in August 1956, after which he was readmitted to the United States at San Ysidro, California, as a returning resident (R. 14, 20).

On August 27, 1953, he was convicted in the Municipal Court of Los Angeles of being a lewd and dissolute person, in violation of Section 647(5) of the California Penal Code (Ex. 7). On March 9, 1956, he was convicted on his plea of guilty in the Los Angeles Superior Court for having committed a homosexual act on February 16, 1956, in violation of Section 288a of the California Penal Code (R. 20; Ex. 2). In 1958, following his return from Mexico, he was arrested on suspicion of a similar offense in Oxnard, California, but the charges were dismissed (Tr. 10–11; Ex. 6).

In a sworn statement before an investigator of the Immigration and Naturalization Service on March 25, 1959, respondent acknowledged that he had had the urge to commit homosexual acts since he was about 24 years old and that he had indulged in such acts with other men in the intervening 22 years whenever the opportunity presented itself, usually about once a month. These activities started while he was living in Switzerland and continued after he came to the United States. His two convictions in Los Angeles were based on homosexual acts. (Ex. 6.)

On April 7, 1959, an order was issued requiring respondent to show cause why he was not deportable under Section 241(a)(1) of the Immigration and Nationality Act, *supra*, as an alien who was ineligible to enter the United States at the time of his August 1956 reentry,[2] on the ground that he had been

[2] This reentry constituted an "entry" into the United States within the meaning of the immigration laws. Immigration and Nationality Act, § 101(a)(13), 66 Stat. 167, 8 U.S.C. 1101(a)(13). See *infra*, pp. 10–12.

convicted of a crime involving moral turpitude and hence was inadmissible under Section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9) (Ex. 1). The conviction specified was that of March 9, 1956, for violation of Section 288a of the California Penal Code (*ibid.*). Hearings were held before a special inquiry officer of the Service, at which respondent was represented by counsel (Tr. 4–13). Respondent admitted the truth of the factual allegations charged in the order to show cause, conceded deportability, and was ordered deported on April 20, 1959 (Tr. 5–7, 13). He took no appeal. That order, however, is concededly invalid[3] and is not involved in these proceedings.

On June 18, 1959, respondent was examined by Dr. Arthur R. Dahlgren, a Senior Surgeon of the United States Public Health Service, who issued a certificate that he was afflicted with "Class A Psychopathic personality" and that this condition existed prior to and at the time of his entry in August 1956 (Ex. 5). On July 22, 1959, on motion of the Service's prosecuting officer, the deportation proceedings were ordered reopened by the special inquiry officer, and further hearings were held (Tr. 15). At the reopened hearing, an additional charge of deportability was lodged, *viz.*, that at the time of his entry in August 1956 he was inadmissible under Section 212(a)(4) of the Act, *supra,* as an alien who was afflicted with psychopathic personality (Tr. 16; Ex. 4). Respondent was served with a statement of the factual allegations underlying this charge, reciting that he had been examined and certified by the Public Health Service

[3] See note 4, *infra*, pp. 7–8.

as being afflicted with "Class A Psychopathic Personality"; that this condition existed prior to and at the time of his August 1956 entry; that for the past 22 years he had been afflicted with the desire for sexual relations with members of his own sex; and that during those years he had indulged in such relations at periodic intervals averaging approximately once a month (*ibid.*). Respondent acknowledged that he had been so certified (Tr. 17–18), and the Public Health Service certificate was received in evidence (Ex. 5, Tr. 18). Also received in evidence was respondent's sworn statement of March 25, 1959, in which he acknowledged his homosexual activities for the past 22 years (Ex. 6, Tr. 20). Respondent conceded at the hearing that he had testified truthfully when he made that statement (Tr. 18–19). Also introduced was the record of respondent's Los Angeles conviction in 1953, which he admitted related to him (Ex. 7, Tr. 20).

At a continued hearing there was received in evidence a report by respondent's psychiatrist, Dr. David R. M. Harvey, based on his examination of respondent on four occasions in May, June, July and August, 1959 (R. 6–8; Ex. 8, Tr. 25). The report acknowledged that respondent had had homosexual experiences since the age of 26 but stated that his "sexual drive—particularly at his age—is thought to be within his range of control, especially if he is under the supervision of continuing contact with a psychiatrist" (R. 7). The report concluded that respondent's deviation was "not sufficient to justify the diagnosis of psychopathic personality"; that the "formal label would be that of:

Sexual deviation, homosexuality, now under control" (R. 8).

Dr. Dahlgren, the Public Health Service Surgeon, appeared and testified that, on the basis of his examination of respondent and his history, he had concluded that respondent was a sexual deviate and that he had classified him as a psychopathic personality because the Manual of the Public Health Service governing the examination of aliens requires that sexual deviates be placed in this category (Tr. 26–29). Agreeing that a standard medical definition of "psychopathic personality" would specify that it be a constitutional disorder, *i.e.*, one due to hereditary or congenital conditions, Dr. Dahlgren stated that he had "no strong feeling" as to whether, according to "traditional medical terms", respondent would be considered a psychopathic personality (Tr. 31–32). Since respondent was beyond question a sexual deviate, he said, and since the instructions of the Public Health Service require that such persons be classified as psychopathic personalities, he had to use this terminology (Tr. 31–33).

In an opinion dated September 22, 1959, the special inquiry officer, while concluding that the deportation charge contained in the original order to show cause was not sustainable,[4] determined that respondent

[4] The officer noted that respondent's March 9, 1956 conviction, on which the original charge of deportability was based, was for "a misdemeanor classifiable as a petty offense" as defined in Section 4 of the Act of September 3, 1954, 68 Stat. 1145, and hence, under that section, was not a ground for mandatory exclusion. (Section 4 of the 1954 Act, now incorporated in

was nevertheless deportable on the subsequently lodged charge that at the time of his August 1956 entry he was excludable under Section 212(a)(4), *supra*, as an alien afflicted with psychopathic personality. Deportation was accordingly ordered on the latter charge (Appendix C, *infra*, pp. 39–47).

Respondent appealed to the Board of Immigration Appeals, which, on November 20, 1959, sustained the deportation order and dismissed the appeal (Appendix B, *infra*, pp. 33–38). On December 9, 1959, he commenced this action against the Service's Los Angeles District Director in the United States District Court for the Southern District of California, seeking declaratory and injunctive relief (R. 3–6, 10). The complaint charged that the deportation order was invalid because it was not based on reasonable, substantial and probative evidence (R. 5). The government filed an answer and motion for summary judgment, supported by the administrative record (R. 10–13, 18–19). In opposing summary judgment, respondent advanced the additional contention that the term "psychopathic personality" in Section 212(a)(4) is "so vague and indefinite as to render the statute invalid and unconstitutional" (R. 20–21). The matter was heard by a

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Section 212(a)(9) of the Immigration and Nationality Act, provides that an alien who is excludable because of conviction of "a misdemeanor classifiable as a petty offense under [18 U.S.C. 1(3)] by reason of the punishment actually imposed" may be admitted to the United States if he has committed not more than one such offense and if he is otherwise admissible. The punishment "actually imposed" on respondent for his March 9, 1956 conviction—a $200 fine (Ex. 2)—brought the offense within the 18 U.S.C. 1(3) definition of a petty offense.)

single district court judge, who, on January 4, 1961, granted the government's motion for summary judgment (R. 19–21). The court noted the legislative history of Section 212(a)(4), which clearly shows the intent of Congress that sexual deviates be classified by the enforcing authorities as psychopathic personalities,[5] and found the evidence sufficient to support the administrative finding that respondent was a sexual deviate at the time of the 1956 entry (R. 20–21). The court rejected the contention based on the alleged vagueness of the term "psychopathic personality", observing that, while it might be true that a criminal statute employing such a term would be stricken for indefiniteness, the same strict standard should not be required of a statute defining aliens who are to be excluded from the United States (R. 21).

On April 17, 1962, the Court of Appeals for the Ninth Circuit set aside the deportation order (R. 43). In its opinion (Appendix A, *infra*, pp. 20–32), it held the term "psychopathic personality" void for vagueness as applied to respondent, refusing to look to the legislative history of the statutory language in order to determine its meaning.

REASONS FOR GRANTING THE WRIT

In holding Section 212(a)(4) of the Immigration and Nationality Act, declaring aliens "afflicted with psychopathic personality" to be ineligible for admission to this country, void for vagueness as applied in the circumstances of this case, the court of appeals has

[5] See, as to the legislative history, note 6, *infra*, pp. 12–13.

decided an important question of federal law which has not been, but should be, settled by this Court. The decision, which is in conflict with the decision of another court of appeals on the same matter (*Quiroz* v. *Neelly*, 291 F. 2d 906 (C.A. 5); see *infra*, p. 18), is erroneous, we believe, in that it applies a familiar constitutional rule based on due process considerations—that statutes designed to govern conduct must give fair notice of the kind of action intended to be proscribed—to a situation where Congress is not seeking to regulate conduct but to prescribe standards for admission to the United States.

1. Congress has plenary authority to make rules and regulations for the admission of aliens and to establish categories of aliens who shall be excluded or deported, either absolutely or on such conditions as it may prescribe. *The Chinese Exclusion Case*, 130 U.S. 581; *Fong Yue Ting* v. *United States*, 149 U.S. 698; *Knauff* v. *Shaughnessy*, 338 U.S. 537; *Carlson* v. *Landon*, 342 U.S. 524; *Harisiades* v. *Shaughnessy*, 342 U.S. 580. Indeed, this Court has held Congress may even legislate retroactively in this field, decreeing deportation for past conduct which was not a ground for deportation when it occurred. *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; *Marcello* v. *Bonds*, 349 U.S. 302; *Lehmann* v. *Carson*, 353 U.S. 685.

One of the classes of aliens whose deportation Congress requires consists of aliens who were excludable by law at the time of their entry. It is immaterial that the entry involved is a reentry. "Entry" is a term of art in immigration law and includes "any

coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425. This concept has been substantially adopted in the 1952 Act's definition of "entry" as meaning (§101(a)(13), 66 Stat. 167, 8 U.S.C. 1101(a)(13)):

> any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

Thus, unless Congress has otherwise provided, an alien seeking reentry must meet all conditions of admission specified by Congress for initial entrants and if he falls within any of the inadmissible classes he must be excluded. By the same token, if, following reentry, it is found that at the time of reentry he was within one of the inadmissible classes, his deportation is required by Section 241(a)(1) (*supra*, p. 3). Apart from alienage, which is not questioned

here, the sole issue presented in such a situation is whether the alien was excludable by then existing law.

In this case, the special inquiry officer found from the evidence that respondent was a sexual deviate at the time of his entry in August 1956 and was therefore inadmissible under Section 212(a)(4) as one "afflicted with psychopathic personality." The legislative history of the quoted phrase shows clearly that Congress intended to include all sexual deviates, including homosexuals, in this category.[6] In reject-

[6] The pertinent legislative history is cited in footnote 2 of Judge Frank's concurring opinion in *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412–413 (C.A. 2), to which reference was made by the district court in this case (R. 21). Since the court of appeals not only does not question the conclusion that the legislative history shows that Congress intended sexual deviates to be classified as psychopathic personalities, but apparently concurs in this view (see Appendix A, *infra*, pp. 23–24, including n. 4), there is no need at this time to trace the pertinent history in detail. See, in particular, S. Rep. 1515, 81st Cong., 2d sess., p. 345; H. Rep. 1365, 82d Cong., 2d sess., pp. 46–47; S. Rep. 1137, 82d Cong., 2d sess., p. 9. The last-cited report stated: "Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sex . . deviates.*" [Emphasis added.]

In view of the unambiguous legislative history, the courts which have considered the question have had no difficulty in concluding that aliens "afflicted with psychopathic personality", as the term is used in Section 212(a)(4), includes aliens who

ing respondent's claim that the phrase is void for vagueness, the district court relied on its legislative history (R. 21). The court of appeals held, however, that the phrase is unconstitutionally vague and that greater certainty cannot be supplied by consulting the legislative materials to ascertain the congressional purpose (Appendix A, *infra*, pp. 24, 28). We believe this was error.

The void-for-vagueness principle, upon which the court of appeals relied, was articulated by this Court in *United States* v. *Harriss*, 347 U.S. 612, 617, as follows:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Although the rule has found its commonest application in cases involving criminal statutes, it has also been applied to statutes imposing civil sanctions. See, *e.g.*, *Small Company* v. *American Sugar Refining Company*, 267 U.S. 233, 239. Since the point of the rule is that a person is entitled to know, before he acts, just what actions are forbidden, it follows that if the statute on its face is too vague to give him

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are homosexuals. See *Quiroz* v. *Neelly*, 291 F. 2d 906 (C.A. 5); *United States* v. *Flores-Rodriquez*, 237 F. 2d 405, 412–416 (C.A. 2; concurring opinion); *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565 (S.D. N.Y.), affirmed *sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F. 2d 330 (C.A. 2), certiorari denied, 364 U.S. 824.

notice, the deficiency cannot be supplied by the gloss of court decisions construing the statute after he has acted. *Smith* v. *Cahoon* 283 U.S. 553, 563–565; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 455–456.[1] The court of appeals here went further and held that even antecedent materials, such as legislative history, cannot be used to clarify the terms of an otherwise vague statute. This conclusion seems open to question. This Court has considered the prior construction of a state statute by the highest court of the state as fixing its meaning when it was attacked as void for vagueness. See, *e.g.*, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573–574. If the gloss of prior judicial construction can be used to lend certainty to an otherwise insufficiently definite statute, so as to put on notice an individual who has not yet acted, it would seem that the statute's legislative history might serve that purpose. Cf. *Screws* v. *United States*, 325 U.S. 91, where the legislative history of a criminal statute was considered in construing it narrowly so as to obviate the charge that it was unconstitutionally vague.

But even assuming the court of appeals is correct in its view that resort may never be had to legislative history to supply definiteness to a statute whose function is to give warning, that rule does not govern this case. For the statutory provision here involved is not designed to furnish advance notice. Nor is it required to do so. An alien whom the government seeks

[1] But see *Winters* v. *New York*, 333 U.S. 507, 514–515: "We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation."

to deport is of course entitled, as a matter of procedural due process, to notice of the charges he must face at the deportation hearing. But it does not follow that, before he can become liable to deportation, Congress must first warn him of the classes which are deportable so that he may guide himself accordingly. As we have seen, Congress may enact grounds of deportation retroactively, and thereby render an alien deportable for past conduct which did not entail deportability when it occurred. *Harisiades* v. *Shaughnessy; Galvan* v. *Press; Marcello* v. *Bonds; Lehmann* v. *Carson* (cited *supra*, p. 10).

Although no deportation or exclusion provision has heretofore been set aside on grounds of vagueness, this Court, in *Jordan* v. *De George*, 341 U.S. 223, 231–232, examined a deportation enactment to determine whether it met the constitutional test of definiteness. There, however, the provision was one in which deportability depended upon post-entry conduct.* Where liability to deportation is thus made to depend upon the alien's future behavior, the statutory enactment can indeed be a guide to his conduct, and there is reason to apply the void-for-vagueness principle.

Here, however, the statutory ground for expulsion is not the alien's conduct after entry, but his condition at the time of entry. Congress has undoubted power to exclude aliens applying for admission whom

*The provision required the deportation of aliens who were sentenced more than once to imprisonment for one year or longer because of conviction in this country of "any crime involving moral turpitude" committed after entry (341 U.S. at 225).

it deems undesirable because of some mental or physical condition and to direct their deportation if their inadmissibility is discovered only after entry has been effected. Section 212(a), 8 U.S.C. 1182(a) is in large measure a catalog of such disqualifying conditions. These provisions of the statute are in no sense guides to conduct, and the application to them of the principle requiring definiteness in behavior-governing statutes can have no rational justification. Whether the administrative proceeding in which such a provision is pertinent be one to exclude or deport, the sole inquiry is whether the alien is (or at entry was) in one of the classes which Congress intended to exclude. The administrative authorities may properly look to any available source, including the legislative history of a particular provision, to ascertain the legislative intent. Section 241(a)(1), requiring the deportation of aliens who managed to effect entry notwithstanding their legal ineligibility to enter, can in no sense be regarded as a notice-giving statute, warning aliens of the kind of behavior from which they must refrain if they wish to avoid deportation.

2. The decision below seeks to avoid this conclusion by pointing out that, "[w]hile the post-entry conduct [of respondent] was not itself the ground of deportation," such conduct "was used as evidence of a pre-entry deportable condition"—with the consequence, it is said, that respondent was prejudiced by the vagueness of the term "psychopathic personality" in the challenged provision (Appendix A, *infra*, p. 27). The court reasoned that since, "[i]nsofar as the record reveals, continuance of homosexual prac-

tices after Fleuti entered this country in 1952, and again in 1956, was not compulsive, but was a matter of choice," he might not have engaged in such practices in this country had he been adequately warned by the statute that "harsh results," *i.e.*, deportation, might follow if he did not refrain from such conduct (Appendix A, *infra*, pp. 26–27). The court thus applied the void-for-vagueness principle, requiring definiteness in statutes imposing sanctions on future conduct, to an enactment which prescribes no such sanction, but, instead, undertakes to define a psychopathic condition making aliens who would enter this country ineligible to do so.

No precedent exists for so sweeping and far-reaching an application of the void-for-vagueness rationale. The court here limited its holding to the statute's impact on the alien's post-entry behavior. But it is difficult to see why the court's rationale, if sound, would not apply to pre-entry behavior as well. Under such a view, an alien whom the immigration authorities barred at our gates on the ground that he was afflicted with a condition, *e.g.*, homosexuality, which Congress clearly intended should make him ineligible for entry, could claim standing to challenge the pertinent statutory section for vagueness on the ground that, but for the lack of precision in the language of the statute, he might have so conducted himself before reaching our shores as to have avoided supplying the evidence from which the immigration authorities inferred his disqualifying trait.

3. The decision below is in conflict with *Quiroz* v. *Neelly*, 291 F. 2d 906, in which the Court of Appeals for the Fifth Circuit sustained the deportation of a homosexual under the same provisions of law as those involved here. The court, after referring to the legislative history of Section 212(a)(4), observed (291 F. 2d at 907):

> Whatever the phrase "psychopathic personality" may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here.

Moreover, the issue presented is a recurring one in the administration of the immigration laws; other cases are now pending in the courts involving deportation orders predicated on the same provision of Section 212(a)(4).*

* *Reinsch* v. *Rosenberg*, C.A. 9, No. 17691, involves an alien ordered deported because inadmissible on reentry in 1960 as a psychopathic personality, a finding based on acts of exhibitionism. On April 5, 1962, the court of appeals directed that the cause be resubmitted at the time of final disposition of the instant case. *Frosinos* v. *Immigration and Naturalization Service*, C.A. 6, No. 14987, involves an alien ordered deported because inadmissible on reentry in 1961 as a psychopathic personality, a finding based on acts of window-peeping and exhibitionism. Counsel for the alien have requested the United States Attorney to stipulate for continuance, pending final disposition of the present case. *La Rochelle* v. *Sahli*, C.A. 6, No. 14813, involves an alien ordered deported because inadmissible on reentry in 1960 as a psychopathic personality, a finding based on acts of homosexuality.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General,
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JULY 1962.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE FLEUTI, APPELLANT-PETITIONER, *vs.* GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA, APPELLEE-RESPONDENT

No. 17,325. April 17, 1962

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Before: CHAMBERS, HAMLEY and DUNIWAY, Circuit Judges.

HAMLEY, *Circuit Judge:*

George Fleuti, a resident alien, was ordered deported by the Immigration and Naturalizaton Service on the ground that at the time of his entry he was a "psychopathic personality." Having exhausted his administrative remedies, Fleuti brought this action in the district court to review that order. The district court entered judgment upholding the order of deportation, and Fleuti appeals.

For the reasons indicated in the margin we consider the case as before us for initial review, pursuant to 8 U.S.C., § 1105a, and 5 U.S.C., § 1031, et seq., rather than on appeal from a district court judgment.[1] Fleuti will be regarded as the petitioner and George K.

[1] Section 5(a) of the Act of September 26, 1961, 75 Stat. 651, added a new section 106(a) to the Immigration and Nationality

Rosenberg, District Director of Immigration and Naturalization Service, Los Angeles, as respondent. Under the circumstances of this case our reviewing function is substantially the same as was that of the district court which initially reviewed the deportation order.

Fleuti contends that the order is invalid because not based upon reasonable, substantial and probative evidence. He further contends that execution of the order would violate the Due Process Clause of the

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Act, 8 U.S.C. § 1105a. This new section provides that the procedure prescribed for the review of other federal agency orders (5 U.S.C., § 1031, et seq.) shall be the sole and exclusive procedure for the judicial review of deportation orders entered pursuant to section 242(b) of the Immigration and Nationality Act. Section 5(b) of the Act of September 26, 1961, provides that any judicial proceeding to review an order of deportation "which is pending unheard" in any district court on the effective date of that section (October 26, 1961), with exceptions not here relevant, shall be transferred for determination to the court of appeals having jurisdiction to entertain a petition for review under that section.

The case before us was disposed of by the district court prior to October 26, 1961, thus a transfer of the cause to this court under the statutory provision referred to above was not required at that time. We note, sua sponte, however, that Fleuti seeks to restrain the enforcement of a deportation statute on the ground, which we find substantial, that the statute is unconstitutional as applied to him. The case should therefore have been heard by a district court of three judges. 28 U.S.C., § 2282; *Wolf* v. *Boyd*, 9 Cir., 287 F. 2d 520.

But if we now remand the case because of failure to convene a three-judge court, it would become a judicial proceeding "which is pending unheard" before the district court. It would then be necessary for the district court to transfer the case back to us as provided in section 5(b) of the Act of September 26, 1961 referred to above. It follows that, to avoid circuity, this court should consider the case as having been so remanded and transferred back and therefore now before us as an initial judicial review pursuant to 8 U.S.C., § 1105a and 5 U.S.C. § 1031 et seq.

Fifth Amendment because, as applied to him, the statute in using the term "psychopathic personality" is void for vagueness.

Fleuti is a native and citizen of Switzerland. He was admitted to the United States for permanent residence on October 9, 1952. He remained in this country until August, 1956, when he visited for a few hours in Ensenada, Mexico. He then re-entered as a returning resident alien and has remained in this country since then.

The charges upon which the deportation order is based were filed against Fleuti on August 5, 1959. It was alleged that Fleuti is deportable because, at the time of his 1956 entry, he was within a class of aliens excludable by the law existing at the time of such entry, namely aliens afflicted with "psychopathic personality." The statutes cited as authorizing deportation on such a showing are sections 241(a) and 212(a)(4) of the Immigration and Nationality Act, 8 U.S.C., §§ 1251(a) and 1182(a)(4).[2]

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[2] Section 241(a) reads in part:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry; * * *."

Section 212(a)(4) reads in part:

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect; * * *."

The quoted language of section 212(a)(4) was added to the statute on June 27, 1952, which was before Fleuti's first entry, but did not become effective until December 24, 1952, which was after that entry.

It was not stated in the formal charges what specific physical or mental condition Fleuti had at the time of his 1956 entry which brought him at that time within the class of aliens afflicted with "psychopathic personality." Attached to the charges, however, was a sheet on which certain factual allegations were listed, as set out in the margin.[3] It is thereby indicated that the particular condition thought to bring Fleuti within the stated class was his alleged affliction with the desire for, and regular indulgence in, homosexual practices over a long period of years.

It is an established principle of federal adjudication that questions of constitutional law are not to be dealt with in advance of the necessity of deciding them. See *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 72. It would therefore at first blush appear that we ought to first consider Fleuti's contention that the deportation order is not based upon adequate evidence, on the theory that if this question is decided in his favor we need not reach the constitutional question which he poses.

The difficulty in following this course, however, lies in the fact that: (1) in order to determine whether the evidence is sufficient it is necessary to decide what is meant by "psychopathic personality"; (2) this term is not defined in the statute and re-

[3] You were examined by a Medical Officer of the United States Public Health Service at Los Angeles, California on June 18, 1959; you were certified by an official of that Service, on that date, as being afflicted with "Class A Psychopathic Personality"; that official further certified on that date, that this "condition existed prior to and at the time of entry (August 1956)"; you have been afflicted with the desire for sexual relations with members of your own sex for approximately the past twenty-two (22) years; you have indulged in the practice of sexual relations with members of your own sex at periodic intervals, averaging about once a month, for the past twenty-two (22) years.

spondent relies upon the legislative history in order to establish the meaning of the term;[4] but (3) if the statute, judged on its face and as applied to Fleuti, is void for vagueness, access may not be had to the legislative history in order to establish its meaning.[5]

[4] Arguing that the term was intended to include, among others, anyone who was a homosexual or sex pervert at the time of entry, respondent calls attention to S. Rep. No. 1137, 82nd Cong., 2nd Sess. (1952). That report contains the following statement:

> "Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class do not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."

[5] The doctrine of void-for-vagueness is premised in part on the fiction that all persons in fact know the contents of statutes. But this fiction does not extend to the point of assuming that all persons in fact know the relatively inaccessible legislative history of statutes. Thus it is uniformly held that in applying the doctrine, a federal statute must be judged on its face. See *United States* v. *Harriss*, 347 U.S. 612, 617; *United States* v. *Spector*, 343 U.S. 169, 171.

Once it is ascertained that the language of the statute is sufficiently definite to satisfy due process standards, the legislative history may become relevant. But the function of such history is not to provide support for an otherwise deficient law; rather it is to assist the court in best effectuating the legislative intent by possible construction and limitation of the statutory language. Hence, if the challenged class of offenses seems plainly within the terms of the statute, legislative history may be consulted to verify this conclusion. See *Harriss*, *supra*, at 618, 620–622.

It is therefore necessary for us to proceed at once to the constitutional question.

The question of whether a statute is void for vagueness most frequently arises in criminal prosecutions.[6] In such cases the underlying principle is said to be that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. *United States* v. *Harriss*, 347 U.S. 612, 617.

But the Supreme Court has also applied this principle in civil proceedings, and in so doing has expressly ruled that a criminal penalty need not be involved. See *Small Company* v. *American Sugar Refining Company*, 267 U.S. 233, 239, where the court said, referring to other decisions in which the principle had been applied:

> * * * It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

In *Jordan* v. *DeGeorge*, 341 U.S. 223, the court examined, for vagueness, a statute which had been invoked in ordering deportation of that appellant. The court stated that it would do so notwithstanding the fact that it was not a criminal statue.[7] In that case the deportation had been ordered because a proscribed event had occurred after the alien entered this country, namely, "conviction in this country of any crime involving moral turpitude." The particular crime which was held to involve moral turpitude

[6] See 109 U. Pa. L. Rev. 67 for an extensive discussion of the vagueness doctrine in the Supreme Court.

[7] It was held, as a result of that examination, that the particular statute there in question was not unconstitutionally vague.

was conspiracy to defraud the United States of taxes on distilled spirits.

In the case before us, deportation has been ordered not because of any event occurring or act committed after Fleuti's last entry in August 1956, but on the ground that, at the time of that entry, he was excludable as a "psychopathic personality."

However, in proving that, at the time of such entry, Fleuti was a "psychopathic personality," the Immigration and Naturalization Service has not relied exclusively upon evidence concerning Fleuti's condition prior to entry.[8] It presented evidence showing not only that Fleuti had regularly engaged in homosexual practices prior to his first entry in 1952, but that he had continued such practices after that entry and also after his second entry in 1956.[9] The finding that he was a "psychopathic personality" at the time of the 1956 entry is therefore based in part upon post-entry behavior.

Insofar as the record reveals, continuance of homosexual practices after Fleuti entered this country in 1952, and again in 1956, was not compulsive, but was a matter of choice. It follows that if, by reason of vagueness, the statute failed to advise him that homosexual practices conclusively evidence a "psychopathic

[8] Nor was it required to, absent a question of statutory vagueness. See *United States ex rel. Powlowee* v. *Day*, 2 Cir., 33 F. 2d 267.

[9] This evidence consisted of Fleuti's acknowledged history of such practices from 1936 to 1959, and proof of two convictions obtained against him in the courts of California. One of these convictions, obtained in the Municipal Court of Los Angeles, under section 647(5) of the Penal Code of California, relating to lewd and dissolute persons, was for an act committed on August 23, 1953. The other, obtained in the Los Angeles Superior Court under section 288a of the Penal Code of California, relating to homosexual acts, was for an act committed February 16, 1956.

personality" Fleuti was substantially prejudiced. As in the case of a vague criminal statute, he would thereby be deprived of notice that unless he refrained from such conduct harsh results might follow.

While the post-entry conduct was not itself the ground of deportation, but was used as evidence of a pre-entry deportable condition, the prejudice would nevertheless be substantial. The examiner might have found the evidence of pre-entry homosexual practices sufficient to support a finding of "psychopathic personality." But whether such a finding would have been entered in 1959, based on pre-entry conduct prior to October 9, 1952, or whether on such facts a charge would even have been brought, is a matter of speculation.[10] The fact that the examining officer chose to rely heavily upon post-entry behavior is some indication that a charge might not have been filed, or a finding entered, on pre-entry behavior alone.

From what has just been said, it will be observed that, for the purposes of this discussion, we regard Fleuti's conduct between his entry in 1952 and his brief absence in 1956, along with his conduct after his re-entry in 1956, as post-entry behavior. If, dur-

[10] It was originally sought to deport Fleuti, pursuant to sections 241(a) and 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C., §§ 1251(a)(1), 1182(a)(9), as a resident alien who had been convicted of a crime involving moral turpitude. The conviction relied upon was one of those referred to in footnote 9 above. A summary order of deportation was issued on the basis of that charge. It was later set aside by the examining officer, however, on the ground that the conviction relied upon, being a misdemeanor classified as a petty offense, was not one for which deportation could be ordered, in view of certain exceptions contained in the Act. But at the same time that this deportation order was set aside, the administrative proceedings were reopened to receive and consider the new charge that Fleuti was a "psychopathic personality" at the time of his last entry.

ing the years 1952 to 1956, Fleuti was prejudiced by reason of the vagueness of the statute, he may assert such prejudice now, notwithstanding his temporary leave-taking in 1956. The prejudice occurred while he was a resident alien and his constitutional rights as such, acquired during that period, were not "washed out" by his afternoon visit to Ensenada, Mexico.

The question which remains to be decided is whether the deportation statute, in using the undefined term "psychopathic personality" is void for vagueness, as applied in this case.[11]

In determining whether a statute is vague in the constitutional sense, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Jordan* v. *DeGeorge*, at page 231. Or, as stated in *United States* v. *Harriss*, 347 U.S. 612, 617, and *United States* v. *Petrillo*, 332 U.S. 1, 6, would persons of "ordinary intelligence" be able to know what the statute means.

It has already been pointed out (see note 5 above) that in determining whether a statute is void for vagueness, the statute must be judged on its face, without reference to legislative history. We are mindful of the fact that language which is otherwise vague may be made sufficiently certain by definitive construction, even though the language construed is found in other statutes. *Jordan, supra* at 227. However, at the time this post-entry conduct occurred, there was

[11] Following the technique employed by the Supreme Court in similar cases, we consider the question in the context of the case before us without undertaking to determine whether the statute is necessarily void for vagueness with regard to all possible applications. See *Williams* v. *United States*, 341 U.S. 97, 101; *Jordan* v. *DeGeorge*, 341 U.S. 223, 232.

no decisional law as to the meaning of the term as used in this or any other federal statute.[12]

Dr. A. R. Dahlgren, the Public Health Service surgeon who had certified that Fleuti was a "psychopathic personality," testified that he did so because the Public Health Service manual for medical examination of aliens required him to so certify anyone who is a sex deviate. Dr. Dahlgren, who is not a psychiatrist, did not consider whether Fleuti's condition was hereditary, congenital, environmental or otherwise. His finding was merely that Fleuti was a sexual deviate and that "by the instructions which I must follow, I have to place these deviates in this category."[13]

Dr. David R. Harvey, Fleuti's attending psychiatrist, was of the opinion that Fleuti's deviation is not sufficient to justify the diagnosis of "psychopathic

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[12] The term "psychopathic personality" was used in a Minnesota statute; however, the term was expressly and narrowly defined in the statute and such definition was further construed and limited by the Supreme Court of Minnesota. In the light of such definition and construction, the United States Supreme Court had no difficulty in holding that the statutory term, as there used, was not too vague and indefinite to constitute valid legislation. *Minnesota* v. *Probate Court*, 309 U.S. 270. However, the government is not in a position to argue that this case adds certainty or definiteness to the term as used in the Immigration Act, because Fleuti would clearly not be classed as a "psychopathic personality" under the Minnesota statute.

[13] Dr. Dahlgren further testified: "We have to use certain terminology—and the rest of the world may not agree with this terminology; we are so ordered, therefore we do. * * *" The doctor agreed that a standard definition of "psychopathic personality" would specify that it be a "constitutional" disorder due to hereditary or congenital conditions, and stated that he had no "strong feeling as to whether, according to traditional medical terms, Fleuti would be considered a 'psychopathic personality.'"

personality." He stated that the formal label for Fleuti's condition would be that of "sexual deviation, homosexuality, now under control."[14]

It is apparent that these two doctors, confronted with the identical facts, applied different standards in determining whether Fleuti was a "psychopathic personality." Dr. Dahlgren, feeling himself bound by the Public Health Service Manual, applied the test of whether Fleuti was a sex deviate, apparently ending the inquiry at that point. Dr. Harvey, while not insisting upon a showing of hereditary or congenital condition, considered such additional factors as the extent of the deviation, its effect upon other habits and activities, and whether control over the practice had been manifested.[15]

It is not surprising that these two doctors gave widely varying meanings to the term "psychopathic

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[14] Dr. Harvey expressed this further opinion:

"* * * He (Fleuti) does not frequent homosexual hangouts, has no evident interest in youths, manifests no irresponsible trends, and has his main social contacts with respected members of the community. * * * His sexual drive—particularly at his age—is thought to be within his range of control, especially if he is under the supervision of continuing contact with a psychiatrist. * * * His deviation is not sufficient to justify the diagnosis of psychopathic personality. * * * I do not think that another psychiatrist with adequate training and experience will be likely to disagree with my findings."

[15] According to most present-day psychiatrists, "psychopathic personality" is attributable to environmental factors, whereas the earlier view was that this condition was either hereditary or congenital. The term has always been understood as referring to a lifelong pattern of behavior in conflict with social norms but without accompanying guilt or anxiety. The medical authorities and writers who have expressed these views are collected in a Note and Comment, 68 Yale L.J. 931, at 935, note 10.

personality."[16] Congress was content to let "psychopathic personality" stand for "homosexuals" and "sex perverts," because the Public Health Service advised it that the term is "sufficiently broad" to accomplish this.[17] But the Public Health Service itself considered the term vague, saying in a report which was before the Congress in 1952:

> Although the term "psychopathic personality" is vague and indefinite, no more appropriate expression can be suggested at this time.[18]

The Public Health Service view that the term is "vague and indefinite" is confirmed by authoritative writers in this field. Expert opinions to this effect, collected at page 940, note 33 of the article referred to in note 15 herein, are quoted in the margin.[19]

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[16] It is not established that Dr. Dahlgren would have differed with Dr. Harvey, if he had felt free to express his own opinion as to the term, rather than feeling obliged to apply the Public Health Service definition.

[17] S. Rep. No. 1137, 82nd Cong. 2nd Sess. (1952).

[18] Report of the Public Health Service on the medical aspects of H.R. 2379, in H.R. Rep. No. 1365, 82nd Cong., 2nd Sess. 46–47 (1952)

[19] Noyes, *Modern Clinical Psychiatry*, 3d ed. 1941, 410: Psychopathic personality

"* * * is considered by many to be a meaningless designation * * * not yet is there any common agreement * * * as to classification or * * * etiology."

Curran & Mallinson, *Psychopathic Personality*, 90 J. Mental Sci., (1944) 266, 278:

"The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character."

Guttmacher: *Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time*, in Current Problems in Psychiatric Diagnosis, (Hoch & Zubin, ed. 1953), 139, 154:

It therefore appears that the medical experts called to apply the term in this particular case are in disagreement as to what it means, the Public Health Service which asked Congress to use the term concedes that it is "vague and indefinite," and authoritative writers state that there is confusion and general disagreement as to its meaning.

The conclusion is inescapable that the statutory term "psychopathic personality," when measured by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein. Since this statutory term thus fails to meet the test to be applied in determining whether a statute is vague in the constitutional sense, we hold that the statute is void for vagueness, as applied in this case. Enforcement of the order of deportation would therefore deprive Fleuti of the due process of law.

The order of September 22, 1959 for the deportation of George Fleuti is declared to be void, that order is hereby set aside, and enforcement of the order is enjoined.

(Endorsed) Opinion Filed April 17, 1962.

FRANK H. SCHMID, *Clerk.*

"At present, the diagnosis of a psychopathic personality is practically meaningless."

Tappan, *Sexual Offenses and Treatment of Sexual Offenders in the United States*, in Sexual Offenses, 500, 507, (Radzinowics ed. 1957):

"* * * consensus is impossible in the no-man's land of psychopathic personality."

See also *The Psychopathic Delinquent and Criminal* by George N. Thompson, M.D. F.A.C.P., 42:

"The term 'psychopathic personality' has been used in an extremely broad sense in American psychiatry * * * Loose usage of the term has caused confusion in thinking."

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

NOVEMBER 20, 1959.

File: A-8382428—Los Angeles

In re: GEORGE ERNST MARCEL FLEUTI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard F. Porter, Esquire, 202 North Hawthorne Boulevard, Hawthorne, California

CHARGES:

Order: Section 241(a)(1), Act of 1952 (8 U.S.C. 1251(a)(1))—Excludable at time of entry under Section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9))—Convicted of a crime involving moral turpitude, to wit, sex perversion

Lodged: Section 241(a)(1), Act of 1952 (8 U.S.C. 1251(a)(1))—Excludable at time of entry under Section 212(a)(4) of the Act (8 U.S.C. 1182(a)(4))—Afflicted with psychopathic personality

APPLICATION: Voluntary departure

The respondent, a 47-year-old alien, a native and citizen of Switzerland, appeals from a decision on September 22, 1959, directing deportation on the charge lodged in the proceedings, namely, that under Section 241(a)(1) of the Immigration and Nationality Act the respondent is deportable, in that, he was excludable at the time of entry in August 1956

under Section 212(a)(4) of the Act as an alien afflicted with psychopathic personality. The charge in the Order to Show Cause, which is assigned under Section 241(a)(1) of the Immigration and Nationality Act, alleging that the subject was excludable at time of entry under Section 212(a)(9) of the Act, as one convicted of a crime involving moral turpitude, to wit: sex perversion, has not been sustained.

Counsel excepts to the findings that the alien is deportable on the charge lodged in the hearing. He also excepts to the finding that the alien's application for voluntary departure should be denied (8 U.S.C. 1254(e)).

There have been a series of hearings in this case. Following the initial hearing the special inquiry officer ordered deportation on April 20, 1959. On motion presented by the examining officer on July 6, 1959, to reopen the hearing, an order was entered granting the motion on July 22, 1959. This appeal comes forward following the reopened hearing.

The respondent was admitted to the United States on October 9, 1952, at Rouses Point, New York, for permanent residence. He last entered at San Ysidro, California, during August 1956 as a legally resident alien returning to resume residence. Exhibit 2 in the record is a document showing the respondent's conviction in Los Angeles County, California, on plea of guilty on March 16, 1956, to violation of Section 288a of the Penal Code of California (sex perversion, committed February 16, 1956). He was directed to pay a fine of $200, or to serve one week in jail for each five dollars of fine not paid. The fine was paid. The special inquiry officer has correctly found that the offense involves moral turpitude.

Exhibit 7 is a court record showing the respondent's conviction in the Municipal Court, Los Angeles

County, California on August 27, 1953, for violation of subdivision 5 of Section 647 of the Penal Code of that state, in that he was wilfully and unlawfully a lewd and dissolute person. He was sentenced to pay a fine of $100 or serve one day's imprisonment for each five dollars of the fine. The fine was paid (Exhibit 7). This crime does not involve the element of moral turpitude (*Matter of G– B–*, 5 I&N Dec. 18).

The special inquiry officer has decided that within the provisions of Section 17, California Penal Code, defining felonies and misdemeanors, the alien's conviction in 1956 may be classified as a misdemeanor within Section 1(3) of Title 18, U.S.C. Since the conviction in 1953 does not involve moral turpitude, consideration under the provisions of Section 4 of the Act of September 3, 1954 (Public Law 770) is not precluded to wipe out the conviction in 1956 as a ground for deportation (*Matter of C–*, 6 I&N Dec. 331). Accordingly, the respondent was not excludable at the time of last entry as charged in the Order to Show Cause. As previously stated, that charge has not been sustained.

The order for deportation is based on the charge lodged in the reopened hearing. The special inquiry officer has carefully set forth the evidence, supporting such charge. The evidence consists of a medical certification, the testimony of a physician of the United States Public Health Service, the court records of two convictions, and a statement by the respondent's private physician-psychiatrist. The special inquiry officer has made specific findings and conclusions relative to the charge on which the deportation order is based.

Counsel alleges that the Government has not shown by preponderance of the evidence that the respond-

ent is deportable. With respect to that allegation, counsel disagrees with Finding of Fact No. 6, namely, that on June 18, 1959 the respondent was certified by a senior surgeon of the United States Public Health Service as being afflicted with a Class A condition, "psychopathic personality", which condition existed prior to, and at the time of last entry in August 1956. The medical certificate and the testimony of the certifying physician are evidence which, in part, establishes that the respondent was excludable at time of last entry (p. 26 and Exhibit 5).

In adjudicating the issue of deportability in this, an expulsion proceeding, all of the relevant evidence pertaining to the question in issue may be considered. In summarizing the evidence, relating to the allegations in the lodged charge herein, the special inquiry officer has discussed all of the evidence consisting of the medical certification (Exhibit 5), the admissions made by this subject to a Service investigator under oath on March 25, 1959 (Exhibit 6), the court records showing criminal convictions (Exhibits 2 and 7), and other testimony and statements. Aside from the court records of criminal convictions for improper sexual behavior during the past six years (Exhibits 2 and 7), which cannot be disputed by the respondent, the alien who is age 47 years has admitted that he has had the homosexual urges (the urge to commit homosexual acts with men) since he was age 20 years; and that he has committed acts of sex perversion, intermittently and frequently for a period of 22 years (Exhibit 6).

The respondent's medical adviser, a psychiatrist, who has examined him on four occasions has diagnosed his condition as "sexual deviation, homosexuality, now under control" (Exhibit 8). The senior surgeon, United States Public Health Service, A. R. Dahlgren who gave the certification on June 18, 1959, had before

him at that time the alien's history including admissions of numerous acts of sexual relations with men. Dr. Dahlgren has testified in the reopened hearing and has submitted to cross examination. He has explained that the legal term, psychopathic personality is equivalent to the medical designation "personality disorders" which may be broadly defined; and that they are characterized by development defects or pathological trend in the personality structure, with minimal subjective activity and little or no distress. In most instances the disease is manifested by a life-long pattern of action or behavior rather than by mental or emotional symptoms. He has also explained that within the definitions and the instructions set forth in the Manual for Medical Examination of Aliens the respondent's condition is diagnosed as sexual deviation (Part II, Class A condition, Chapter 6, Section A, 6, Manual for Medical Examination of Aliens) (pp. 30-34 inclusive and Exhibits 5, 6).[1]

[1] 6. Psychopathic personality.

a. The legal term "psychopathic personality" is equivalent to the medical designation "personality disorder," which may be broadly defined as follows: "These disorders are characterized by developmental defects or pathological trends in the personality structure, with minimal subjective anxiety and little or no distress. In most instances, the disorder is manifested by a life-long pattern of action or behavior (acting out), rather than by mental or emotional symptoms". An example of such a certificate is Class A, Psychopathic personality, Inadequate personality.

b. *Under this legal category will be classified those applicants who are diagnosed as sexual deviates.* In the medical examination of aliens this is a difficult diagnosis to establish. However, the examiner should assist the consular officer when possible in evaluating an applicant thought to come in this category.

We find that the alien's admissions, the testimony of a physician and his medical certification, and court documents in this record, undisputed, places the respondent's condition within the allegations set forth in the charge lodged in this hearing. We further find that such affliction or condition existed at time of his last entry and constituted a ground of excludability. We do not find from the fact that the respondent is receiving treatment by Dr. R. M. Harvey, a psychiatrist, who is of the opinion that the condition may be controlled if the alien is under the supervision of a psychiatrist, is in any way in conflict with the medical findings of Dr. A. R. Dahlgren on June 18, 1959. Nor do we find that treatment and control of the affliction now is a defense to a finding of deportability. The contentions of counsel are without merit. The allegations in the charge upon which deportability is based are supported by reasonable, substantial and probative evidence.

The special inquiry officer has denied an application for voluntary departure as a matter of administrative discretion. This means that, although the respondent may meet all the requirements for the relief he seeks, his request for relief has been denied as a matter of discretion. Under the factual situation, the Board has no jurisdiction to change the decision of the special inquiry officer, with regard to the exercise of discretion, unless there have been mistakes, errors, prejudice or abuse of discretion. Our careful review of the proceedings reveals no basis for change of the special inquiry officer's decision. The appeal will be dismissed.

ORDER: It is ordered that the appeal in this case be dismissed.

/s/ THOS. G. FINUCANE,
Chairman.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
SEPTEMBER 22, 1959.

File No. A8 382 428—Los Angeles
In re: GEORGE ERNST MARCEL FLEUTI
IN DEPORTATION PROCEEDINGS
IN BEHALF OF RESPONDENT: Richard F. Porter, Esq., 202 North Hawthorne Boulevard, Hawthorne, California
IN BEHALF OF THE SERVICE: Richard L. Lay, Examining Officer (Los Angeles, California)
CHARGES:

Order: Sec. 241(a)—I&N Act—Excludable at time of entry under Sec. 212(a)(9) of the Act—Conviction of a crime involving moral turpitude, to wit: Sex perversion

Lodged: Sec. 241(a)(1)—I&N Act—Excludable at time of entry under Sec. 212(a)(4) of the Act—Afflicted with psychopathic personality

APPLICATION: Voluntary departure in lieu of deportation
ORDER TO SHOW CAUSE SERVED: April 7, 1959

DISCUSSION

The respondent appeared before me in a hearing in deportation proceedings on April 20, 1959, and admitted as being true all of the factual allegations contained in the order to show cause and that he was subject to deportation on the charge set forth in the or-

der. On the basis of these admissions a summary order of deportation was issued the same date.

On July 6, 1959, the Examining Officer for the Government moved to reopen the proceedings for the submission of additional evidence bearing on the issue of deportability, and the motion was granted by the Special Inquiry Officer on July 22, 1959.

The certified copy of the Information filed in the criminal proceedings relating to the respondent's conviction as alleged in allegation No. 5 in the order to show cause and admitted as being true recites that he was charged with a violation of Section 288a of the Penal Code of California, *a felony* (emphasis supplied), and a certified copy of the plea of guilty and judgment also refers to the offense charged as a felony (Ex. 2). In the motion to reopen the Examining Officer concedes that the foregoing conviction was for a misdemeanor and not a felony; that by reason of the punishment actually imposed such misdemeanor was classifiable as a petty offense and consequently the respondent was not subject to exclusion at the time of his last entry into the United States at San Ysidro, California, during August 1956 by virtue of the exemption from excludability provided for in Section 4 of the Act of September 3, 1954. The Special Inquiry Officer agrees with this conclusion for reasons which will be more fully set forth below.

Section 17 of the Penal Code of California defines a felony and a misdemeanor as follows:

> A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a pun-

ishment other than imprisonment in the state prison.

Section 288a of the Penal Code provides among other things that an offender may be punished by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year. Under certain circumstances, not present in this case, the punishment is mandatory that imprisonment shall be in the state prison for not less than three years. The judgment of the court (Ex. 5) shows that the respondent was sentenced to pay a fine of $200 within one week or serve one day in the county jail for each five dollars of said fine not paid. The fine was paid and he did not serve any term of imprisonment. It is clear that under the provisions of Section 17 of the Code the offense for which he was convicted must be considered a misdemeanor.

It having been found that he was convicted of a misdemeanor only, it must be determined if he is eligible for consideration under the provisions of Section 4 of the Act of September 3, 1954, as having committed an offense which is a misdemeanor classifiable as a petty offense under the provisions of Section 1(3) of Title 18, United States Code, by reason of the punishment actually imposed and if he has committed only one such offense. If these questions are answered in the affirmative, then he would not be deportable on the charge contained in the order to show cause as an alien excludable at the time of entry under the provisions of Section 212(a)(9) of the Immigration and Nationality Act because of conviction of a crime involving moral turpitude. The words of condition in the statute, "* * * provided, that the alien has committed only one such offense," are deemed to relate back and to mean only another

offense which would, because of its commission, render the alien excludable. It follows that such other offense must necessarily involve moral turpitude, otherwise it would not constitute a ground of excludability.

Section 1(3) of Title 18, United States Code, provides:

> Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

The evidence of record shows that the respondent was also convicted in the Municipal Court, Los Angeles, California, on August 27, 1953, for violation of subdivision 5 of Section 647 of the Penal Code in that he was wilfully and unlawfully a lewd and dissolute person. He was sentenced to pay a fine of $100 or serve one day's imprisonment for each five dollars of the fine. The fine was paid (Ex. 7). It has been held that such an offense is not a crime involving moral turpitude (*Matter of G– R–*, 5 I&N Dec. 18).

It is concluded that the offense for which the respondent was convicted on March 9, 1956 (violation of Section 288a of the Penal Code) was a misdemeanor classifiable as a petty offense, and as he has not admitted the commission, or been convicted of more than this one crime which involves moral turpitude, he is not deportable on the charge contained in the order to show cause.

There was subsequently lodged in the proceedings the additional charge that he is subject to deportation pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act in that at the time of entry he was excludable under Section 212(a)(4) of the Act as an alien afflicted with psy-

chopathic personality (Ex. 4). He denied in the reopened hearing the truth of the lodged allegations Nos. 9 and 10, which alleged that he had been afflicted with the desire for sexual relations with members of his own sex for approximately the past 22 years and that he had indulged in the practice of sexual relations with members of his own sex at periodic intervals, averaging about once a month, for the past 22 years. He admitted the truth of the lodged allegations Nos. 6, 7 and 8 to the effect that he was examined by a medical officer of the United States Public Health Service at Los Angeles, California, on June 18, 1959; that he was certified by an official of that Service on that date as being afflicted with "Class A Psychopathic Personality;" and that this official further certified on that date that this condition existed prior to and at the time of entry in August 1956.

In a sworn statement made to an Immigration Officer at Ventura, California, on March 25, 1959 (Ex. 6) he admitted having engaged in homosexual acts on many occasions for about 22 years, both before and after his arrival in the United States, but that he had never been arrested for such conduct until he committed such an act in a public park in Los Angeles, California. Since his second arrest he has taken precautions not to be caught, because he believed that if he were, he would be in difficulty with the Immigration authorities. These admissions of the respondent have not been controverted. He admitted that he had read this statement before signing it and that he had testified truthfully. An objection to the statement's introduction in evidence was overruled (8 C.F.R. 242.14(c)). He also denied deportability on the additional charge lodged in the reopened hearing.

On June 18, 1959, he was certified by a United States Public Health Service Senior Surgeon as being afflicted with a Class A condition, Psychopathic Personality, and that this condition existed prior to and at the time of his entry into the United States in August 1956 (Ex. 5). This certification was based upon a personal examination and interview of the respondent by the medical officer who prepared it. There was no substantial fact or facts developed in cross-examination of this medical officer that would tend to disprove his finding that the respondent was at the time of entry a psychopathic personality. In fact, a report of examination by the respondent's own psychiatrist conducted on May 20, June 22, July 8, and August 7, 1959, shows that his condition was diagnosed as "Sexual deviation, homosexuality, now under control" (Ex. 8). This report further recites that his deviation is not sufficient to justify the diagnosis of psychopathic personality and that he is not a danger to any other person. This last conclusion and references in the report to the California Code regarding sexual psychopaths are not relevant to the deportation charge.

The term "psychopathic personality" is a legal term and is equivalent to the medical designation of "personality disorder." It also covers disorders other than those manifested by a sexual deviate, although the latter must be classified as a psychopathic personality (United States Public Health Service Manual for Medical Examination of Aliens, Part II, Chapter 6, Section A, Paragraph 6).

The question of whether homosexuals or sex perverts are persons of psychopathic personality has been thoroughly and exhaustively discussed in the decision of the Board of Immigration Appeals in *Matter of P–*, 7 I&N Dec. 258. The facts in that case are closely

analogous to the present case. In *Matter of P–* the Board found that the excluding provisions of Section 212(a)(4) of the Immigration and Nationality Act relating to persons of psychopathic personality include homosexuals and sexual perverts and that the respondent's admissions of homosexual tendencies and homosexual acts prior to entry plus the certification, based on those admissions, of the United States Public Health Service that he was a person of psychopathic personality was sufficient to support a finding of deportability under Section 241(a)(1) of the Act as having been excludable at the time of entry as a person afflicted with psychopathic personality. In this connection see also *U.S.* v. *Flores-Rodriguez,* 237 F. 2d 405 (2 Cir. 1956).

It is concluded on the basis of all of the evidence of record and the cited cases that the charge lodged at the reopened hearing is sustained.

DISCUSSION AS TO ELIGIBILITY FOR DISCRETIONARY RELIEF

The respondent is a 47-year-old single male, a native and citizen of Switzerland. He has never been married. He was admitted to the United States for permanent residence at Rouses Point, New York, on October 9, 1952, and except for a one-day visit to Ensenada, Mexico, in August of 1956, he has resided continuously in this country since that entry. He is and has been for several years past employed as a hotel desk clerk. The Special Inquiry Officer, after carefully considering all of the facts and circumstances in this case, has concluded that this is not the type of case in which the discretionary relief of voluntary departure should be granted, and his application for voluntary departure will be denied as a matter of administrative discretion. He is not eligible for any other type of discretionary relief from deportation.

He designated Switzerland as the country to which he desired to be deported if found subject to deportation and ordered deported from the United States.

FINDINGS OF FACT

Upon the basis of all of the evidence of record it is found:

(1) That the respondent is an alien, a native and citizen of Switzerland;

(2) That the respondent last entered the United States at San Ysidro, California, in August 1956;

(3) That the respondent was lawfully admitted for permanent residence at Rouses Point, New York, on October 9, 1952;

(4) That at the time of the respondent's last entry into the United States he was admitted to this country as a returning resident alien;

(5) That the respondent was convicted in the Superior Court in and for the County of Los Angeles, State of California, on March 9, 1956, for violation of Section 288a of the Penal Code of California, committed on or about February 16, 1956, and for which offense he was sentenced to pay a fine in the sum of $200 within one week or serve one day in the county jail for each five dollars of said fine not paid;

(6) That on June 18, 1959, the respondent was examined by a Senior Surgeon of the United States Public Health Service at Los Angeles, California, and certified by that officer as being afflicted with a Class A condition, "Psychopathic Personality," which condition existed prior to and at the time of his entry into the United States in August of 1956.

CONCLUSIONS OF LAW

On the basis of the foregoing findings of fact it is concluded:

(1) That under the provisions of Section 4 of the Act of September 3, 1954, the respondent was *not* inadmissible to the United States at the time of his last entry under the provisions of Section 212(a)(9) of the Immigration and Nationality Act because of a conviction of a misdemeanor which was classifiable as a petty offense under the provisions of Section 1(3) of Title 18, United States Code, by reason of the punishment actually imposed.

(2) That under the provisions of Section 241(a)(1) of the Immigration and Nationality Act the respondent is *not* subject to deportation on the ground that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude, under Section 212(a)(9) of the Act: Sex perversion;

(3) That under the provisions of Section 241(a)(1) of the Immigration and Nationality Act the respondent is subject to deportation on the ground that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens afflicted with Psychopathic Personality, under Section 212(a)(4) of the Act.

ORDER

It is ordered that the respondent be deported from the United States in the manner provided by law on the lodged charge only.

BERT F. KEARNEY,
Special Inquiry Officer.

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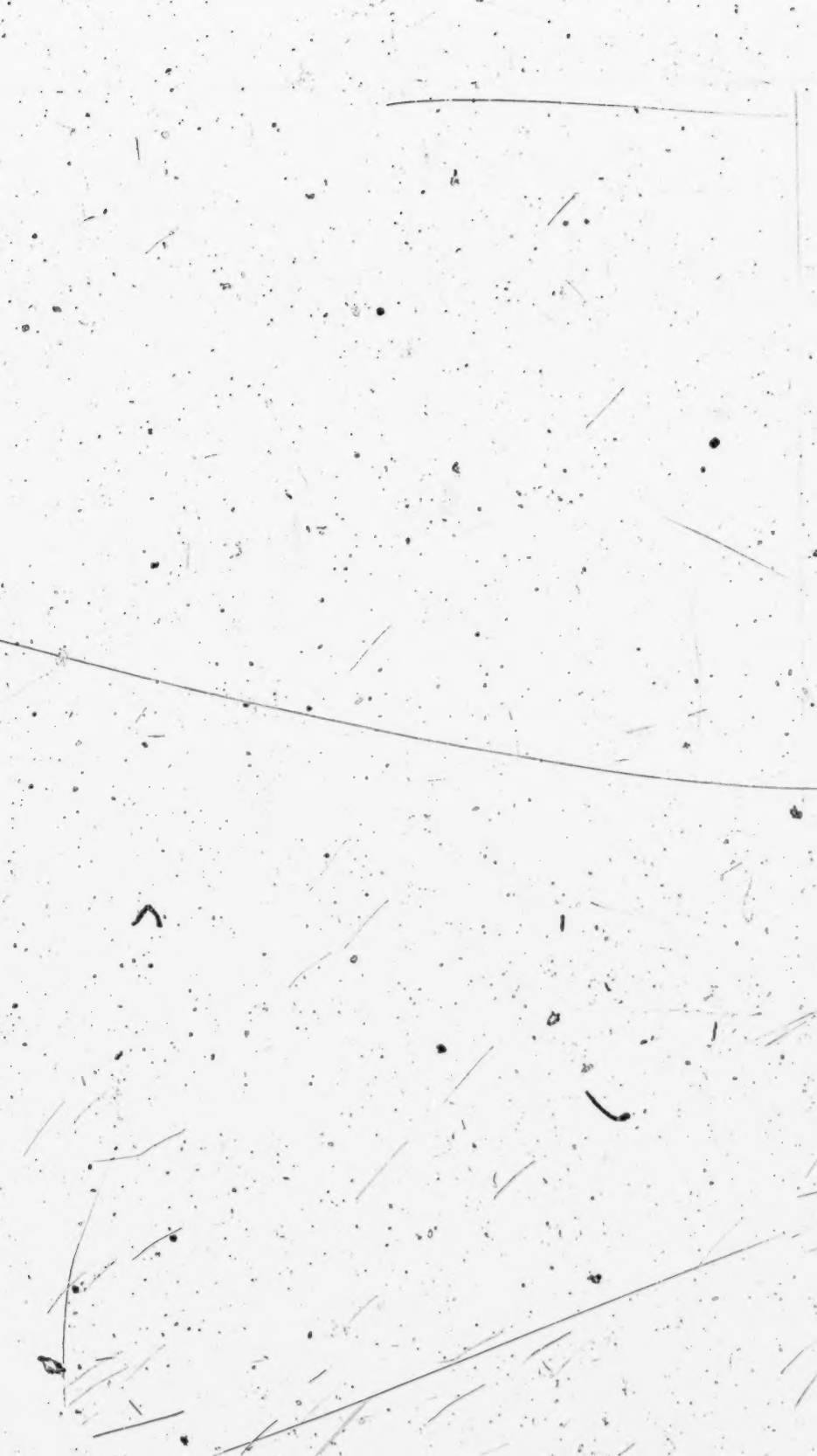

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

GEORGE K. ROSENBERG, District Director of Immigration and Naturalization Service, Los Angeles, California,

Petitioner,

vs.

GEORGE FLEUTI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals (Pet. App. A. pp. 20-32)[1] is reported at 302 F. 2d 652 (1962).

[1] "R." refers to the printed record in the Court of Appeals which is consecutively paginated. This record was lodged with the Clerk of the Court by petitioner together with the authenticated record of the deportation proceedings which was received in evidence in the District Court as Exhibit "A" to the motion by the Immigration and Naturalization Service for summary judgment [R. 18-19]. "Ex" followed by a number refers to the numbered exhibits which were received in evidence at the District Court proceedings, which exhibits are also contained in petitioner's Exhibit "A."

Jurisdiction.

The judgment of the Court of Appeals was entered on April 17, 1962 [R. 43; Pet. App. A, p. 32]. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

Whether the application of Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U. S. C. 1182(a)(4), as applied to respondent deprived him of his Constitutional guarantee of due process of law in that it was void for vagueness.

Statutes Involved.

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U. S. C. 1182(a)(4).

Statement.

Appellant, George E. M. Fleuti, is a fifty (50) year old native and citizen of Switzerland who was admitted to the United States for permanent residence on October 9, 1952. He has resided continuously within the United States of America as a permanent resident since his admission except for a visit of a few hours to Ensenada, Mexico, during August, 1956. Appellant last entered the United States at San Ysidro, California, during August, 1956, after the aforementioned temporary visit to Mexico.

The appellant has been employed in hotel administrative work and has been undergoing psychiatric care and treatment. In a previous communication, Exhibit A [R. 18-19], the treating physician, Dr. David R. M. Harvey, found, as a matter of fact that the plaintiff

is not, and was not, a sexual psychopath, and that his sexual drive is thought to be within his range of control. Such report was based on comprehensive numerous visits. For purposes of classifying appellant for deportation purposes, the Member of the United States Public Health Service concluded otherwise only after a single examination.

Appellant's training includes experience in administrative hotel work in Europe, in Los Angeles, California, with the Ambassador Hotel and in Ojai, California, the location of his present place of employment. His present employers indicate that appellant's conduct and service as Front Office Manager, has, in all respects, been superior in quality and that his honesty and integrity is exemplary.

The charges of deportability arose out of a misdemeanor conviction in the Superior Court of the State of California in and for the County of Los Angeles for a violation of Section 288(a) of the Penal Code of California in February, 1956 [Ex. 2 in the United States District Court, Southern District of California, Central Division, case number 1275-59K Civil]; and a conviction in the Municipal Court, Los Angeles County, California, on August 27, 1953, for violation of Section 647(5) of the California Penal Code [Ex. 7].

A prior order of deportation was issued April 20, 1959, after an initial hearing before the United States Department of Justice Special Inquiry Officer in Los Angeles, California, ordering respondent to be deported from the United States pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act, 8 U. S. C. 1251(a)(1), 66 Stat. 204, on the ground that respondent was subject to deportation at

the time of his entry for the alleged reason that he was within one or more of the classes of aliens excludable by law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude. Subsequent thereto, a Motion to Reopen Proceedings was made and granted wherein it was conceded by the Special Inquiry Officer in the Order Reopening Proceedings, that respondent's petty offense did not constitute a sufficient basis for deportation on the charge contained in the Order to Show Cause. The conviction in 1953, as decided by the Special Inquiry Officer, is not a crime involving moral turpitude and respondent was not an alien excludable at the time of entry under the provisions of Section 212(a)(9).

On or about September 22, 1959, an order of deportation was issued after a hearing before the Immigration Service's Special Inquiry Officer in Los Angeles, California ordering respondent to be deported from the United States pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act, 8 U. S. C. 1251(a)(1), 66 Stat. 204 on the ground that respondent was subject to deportation at the time of his entry for the alleged reason that he was within one or more of the classes of aliens afflicted with Psychopathic Personality under Section 212(a)(4) of the Immigration and Nationality Act, 8 U. S. C. 1182(a)(4), 66 Stat. 182.

The findings and order of deportation was appealed to the Board of Immigration Appeals and the said Board dismissed respondent's appeal on November 20, 1959. (Pet. App. B, pp. 33-38). Thereafter, a complaint was filed on behalf of respondent on December 9, 1959, in the United States District Court, Southern District of California, Central Division [R. 3-6, 10]. On January 9, 1961, an order of the United States District Court, Southern District of California, Central Division was granted on petitioner's motion for summary judgment [R. 19-21].

On April 17, 1962, the deportation order was set aside by the Court of Appeals for the Ninth Circuit based on its determination that the term "psychopathic personality" is void for vagueness as applied to respondent, hence depriving him of his constitutional guarantee of due process of law (Pet. App. A, pp. 20-32).

ARGUMENT.

The Judgment of the Court of Appeals for the Ninth Circuit Is Correct in Deciding a Well Established Question of Constitutional Law and Is Not in Conflict With Any Other Decision, so as to Warrant Further Review of the Case by This Court.

A. Scope of the Court of Appeals Decision.

The Court below was very emphatic in expressing that they were only considering the question in the context of the case before them "without undertaking to determine whether the statute is necessarily void for vagueness with regard to all possible application" (Pet. App. A, 28, footnote 11). It is clear then, that the Court was not deciding whether the statute was invalid as to "a" or "all" homosexuals as the petitioner seems to infer (Pet. 2). Thus, the sole question before the lower court was whether Section 212(a)(4), with specific reference to the clause "Aliens afflicted with psychopathic personality", was constitutionally applied to respondent Fleuti by the Special Inquiry Officer, Immigration and Naturalization Service.[2]

The conduct of respondent between his entry in 1952 and his brief absence in 1956 was regarded by the Court of Appeals, together with his conduct after reentry in 1956, as "post entry behavior" (Pet. App. A, 27). This would mean that respondent, as a legal resident of the United States, was entitled during these periods to Constitutional guarantees, among others, of

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[2]The Court of Appeals regarded this hearing as an initial judicial review pursuant to 8 U. S. C. 1105a and 5 U. S. C. 1031 *et seq.* For further explanation see footnote (1) of opinion (Pet. App. A, 20).

due process of law. Hence, if a statute is to affect him and inflict harsh consequences upon him by virtue of his conduct, then such a statute must give fair notice of its purview as required under the Fifth Amendment.

It was further concluded by the Court of Appeals that the records indicated that:

> "... continuance of homosexual practices after Fleuti entered this County in 1952, and again in 1956, was not compulsive, but was a matter of choice. It follows that if, by reason of vagueness, the statute failed to advise him that homosexual practices conclusively evidence a 'psychopathic personality' Fleuti was substantially prejudiced." (Pet. App. A, pp. 26, 27).

In proving that, at the time of his 1956 entry, respondent was a "psychopathic personality", and thus excludable, the Immigration and Nationality Service had relied on evidence of respondent's behavior after his first entry in 1952 and after his second entry in 1956. From these premises the Court concluded that since respondent was a lawful resident at the time the acts occurred which were relied upon by the Service as a basis of deportation, then respondent could now assert any prejudicial application of a statute against him. The question then is whether the deportation statute wherein appears "the undefined term 'psychopathic personality' is void for vagueness, as applied in this case." (Pet. App. A, p. 28).

The court reviewed the legislative history behind this statute, but reminded that "in determining whether a statute is void for vagueness, the statute must be judged

on its face without reference to legislature history" (Pet. App. A, p. 28), further adding, that the criteria for determination of vagueness in the constitutional sense is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice (Pet. App. A, p. 28). *Jordan v. DeGeorge*, 341 U. S. 223, at page 231. Also see *United States v. Harriss*, 347 U. S. 612, 617; *United States v. Petrillo*, 332 U. S. 1, 6.

Thereafter, upon extensive examination of the following evidence, the Court of Appeals arrived at the conclusion that the statute has been unconstitutionally applied to respondent because it is void for vagueness:

(1) The way that Dr. A. R. Dahlgren, the Public Health Service surgeon (who was not a psychiatrist) had arrived at his certification that respondent was a "psychopathic personality", to wit: Dr. Dahlgren classified respondent because the Public Health Service Manual for examination of aliens required him to so certify anyone who is a sex deviate (Pet. App. A, p. 29). The court indicated that if it were not so required Dr. Dahlgren may have classified respondent otherwise.

(2) Dr. David R. Harvey, respondent's attending psychiatrist, was of the opinion that respondent's deviation is not sufficient to justify the diagnosis of psychopathic personality, but rather the technical label should be "sexual deviation, homosexuality now under control" (Pet. App. A, pp. 29, 30).

(3) The Public Health Service itself considered the term "vague and indefinite, but no more appropriate

than can be suggested at this time" (Pet. App., A, p. 31).

(4) Authoritative writers in this field are in disagreement of the scope of this term, thus confirming that it is "vague and indefinite" (Pet. App. A, p. 31, footnote 15 at p. 30; footnote 19 at p. 31). When an expert in the field is vague as to the meaning of these words, how can a man of common intelligence be certain?

It is therefore submitted that the Decision of the Court of Appeals, was based on a Constitutional ground well established by this Court, namely, that a statute which is so vague and indefinite as to fail to give fair notice of what persons are affected or what conduct is prohibited, violates due process. *Jordan v. DeGeorge*, *supra*, at page 231; *United States v. Harriss*, *supra*, at page 617; *United States v. Petrillo*, *supra* at page 6.

The application of a Constitutional safeguard here is not unusual. The court in *Harisiades v. Shaughnessy*, 342 U. S. 580, along with deciding whether an alien member of the Communist party was deportable under a retroactive statute, also considered whether the First Amendment rights of that person were infringed upon.

B. The Court Below Is Not in Conflict With Any Other Court of Appeals.

It is submitted that the judgment of the Court of Appeals is not in conflict with the decision in *Quiroz v. Neelly*, 291 F. 2d 906 as the court in the latter case did not raise and consider the constitutional question of due process. Neither were facts indicated in that case

to warrant the raising of such an issue as was considered in the instant case. It is also again reiterated that the Court below decided that the statute in question was void for vagueness in this particular context.

C. An Analysis of Petitioner's Arguments.

Petitioner strenuously argues the power of Congress to define the standards for entry of an alien into this country and also that a re-entry of an alien is just like an initial entry, *i.e.*, the same standards may be required. In so arguing the real question considered by the Court of Appeals is begged, to wit, once a citizen becomes a legal resident, is he entitled to due process of law under our constitution. That an alien is so entitled was settled in the leading case of *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); later authorities for this proposition include: *United States ex rel. Barile v. Murff*, 116 Fed. Supp. 163 (1953); *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953); *Galvan v. Press*, 347 U. S. 522 (1954), Rehearing denied 348 U. S. 852. Further, in this Court in *Harisiades v. Shaughnessy, supra*, in determining the deportability of an alien under an *ex post facto* statute also considered the possible violation of an alien's rights under the First Amendment by the application of the statute in question there. Even though re-entry entails the same requirements as entry, yet it does not follow that an alien's rights when residing here were also "washed out" by a few hours in Mexico, as the court below stated (Pet. App. A, p. 28). The logical extension of such a conclusion would be to permit property acquired by the alien resident to be confiscated without due process, if he happens to travel abroad, a Constitutionally precarious position indeed.

(5) There is some question in petitioner's mind as to the validity of the lower court's statement that once a statute is judged to be void for vagueness on its face, access may not be had to legislative history in order to establish its meaning. This doubt arises principally from two cases: *Screws v. United States*, 325 U. S. 91; *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1941). The *Screws* case can be distinguished in that the statute in question there required "specific intent" to violate. The court theme in clarifying their position stated on page 101, that:

> "The court, indeed has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. . . . But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."

In *Chaplinsky v. New Hampshire, supra*, this court on page 574 distinguished the problems involved there from those in *Lanzetta v. New Jersey*, 306 U. S. 451, wherein it was held that the gloss of judicial decision cannot otherwise correct the deficiency of a statute void for vagueness on its face. It is contended by the petitioner's that the Court of Appeals went too far when it held that legislative history cannot be used to

clarify a vague statute. This conclusion, however, is inevitable in light of the rationale of the void for vagueness rule. If judicial decisions, which are essential in the activities of the people, cannot correct uncertainty and vagueness in a statute, then can an event so far removed as legislative history ever provide fair notice?

Conclusion.

For the reasons set forth, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

HIRAM W. KWAN,
Attorney for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 248

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA, PETITIONER

v.

GEORGE FLEUTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (R. 91–100) is reported at 302 F. 2d 652. The opinion of the district court (R. 19–21) is not reported. The opinion and order of the Board of Immigration Appeals appear at R. 86–90. The opinion, findings of fact, conclusions of law, and order of the special inquiry officer of the Immigration and Naturalization Service appear at R. 79–86.

JURISDICTION.

The judgment of the court of appeals was entered on April 17, 1962 (R. 101). The petition for a writ of certiorari was filed on July 13, 1962, and was

granted on October 15, 1962 (R. 102). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Respondent was ordered deported on the ground that he was excludable by law at the time of his entry as "afflicted with psychopathic personality" because he was a homosexual. The finding that he was a homosexual was based in part upon evidence of his conduct within the United States. The question presented is whether, in these circumstances, the deportation order was constitutionally infirm because of the vagueness of the term "afflicted with psychopathic personality", even though it is clear from the legislative history that Congress intended the statutory term to cover homosexuals.

STATUTES INVOLVED

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U.S.C. 1182(a)(4), provides in pertinent part:

> SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * *
>
> (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;
>
> * * * * * *

Section 241(a)(1) of the same Act, 66 Stat. 204, 8 U.S.C. 1251(a)(1), provides in pertinent part:

> SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the

order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

STATEMENT

On September 22, 1959, following a series of hearings before a special inquiry officer of the Immigration and Naturalization Service (R. 30–79), respondent was ordered deported from the United States under Sections 212(a)(4) and 241(a)(1) of the Immigration and Nationality Act (*supra*) as an alien who, at the time of entry, was within a class of aliens excludable under then existing law, *viz.*, "[a]liens afflicted with psychopathic personality" (R. 79–86). The basis of the finding that he was so afflicted was the fact—undisputed and acknowledged—that he then was, and had been for many years, a homosexual (R. 83–84). An appeal by respondent to the Board of Immigration Appeals was dismissed on November 20, 1959 (R. 86–90), and on January 4, 1961, in an action brought by respondent in the United States District Court for the Southern District of California for declaratory and injunctive relief (R. 3–6), a motion by the government for summary judgment was granted (R. 19–21). On April 17, 1962, the Court of Appeals for the Ninth Circuit set aside the deportation order and enjoined its enforcement on the ground that the term "afflicted with psychopathic personality", as used in Section 212 (a)(4) and applied in this case, is void for vagueness.

The pertinent facts are not in dispute and may be summarized as follows:

A. THE PROCEEDINGS BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

1. Respondent is a 50-year-old alien, a native and citizen of Switzerland (R. 4, 14, 74). He is unmarried and has no children or dependents (R. 74, 84). He was admitted to the United States for permanent residence on October 9, 1952, and has been here continuously since that time, except for a visit of a few hours to Ensenada, Mexico, in August 1956, following which he was readmitted to the United States at San Ysidro, California, as a returning resident (R. 14, 20).

On April 7, 1959, the Immigration and Naturalization Service issued an order requiring respondent to show cause why he was not deportable under Section 241(a)(1) of the Immigration and Nationality Act (*supra*) as an alien who, at the time of his August 1956 reentry,[1] was excludable on the ground that he had been convicted of a crime involving moral turpitude (and hence was inadmissible under Section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9)) (R. 42). The offense on which the charge of excludability was based (which was not the charge on which the ultimate order of deportation was based; see *infra*, pp. 5–6, 9, incl. n. 2) was the commission of a homosexual act on February 16, 1956, in violation of Section 288a of the

[1] This reentry constituted an "entry" into the United States within the meaning of the immigration laws. Immigration and Nationality Act, § 101(a)(13), 66 Stat. 167, 8 U.S.C. 1101(a)(13). See *infra*, pp. 16–18.

California Penal Code, for which respondent was convicted on a plea of guilty, on March 9, 1956, in the California Superior Court in and for the County of Los Angeles (R. 42, 43–44). On April 20, 1959, following a hearing before a special inquiry officer (R. 30–41), at which respondent, through counsel, admitted the truth of the factual allegations charged in the order to show cause and conceded deportability (R. 34–35, 42), he was ordered deported (R. 40, 46–47). He took no appeal. That order, however, is concededly invalid (see *infra*, pp. 5–6, 9, incl. n. 2) and is no longer involved.

2. On July 22, 1959, on motion of the Service's prosecuting officer (R. 47–49), the proceedings were ordered reopened by the special inquiry officer (R. 50),[2] and on August 5 the charge presently before the Court—deportability by reason of excludability at entry as an alien "afflicted with psychopathic per-

[2] The motion noted that respondent's conviction of March 9, 1956, on which the outstanding deportation order was based, was for "a misdemeanor classifiable as a petty offense" as defined in Section 4 of the Act of September 3, 1954, 68 Stat. 1145, and hence, under that section, was not in itself a ground for exclusion (R. 48–49). (Section 4 of the 1954 Act, which has been incorporated in Section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9), provides that an alien who is excludable because of conviction of "a misdemeanor classifiable as a petty offense under [18 U.S.C. 1(3)] by reason of the punishment actually imposed" may be admitted to the United States if he has committed not more than one such offense and if he is otherwise admissible. The punishment "actually imposed" on respondent for his March 9, 1956 conviction—a $200 fine (R. 44, 48, 49)—brought the offense within the 18 U.S.C. 1(3) definition of a petty offense.)

sonality"—was lodged as an additional charge (R. 51–52, 54, 70–71). In support of the latter charge, it was alleged that respondent had been examined by a medical officer of the United States Public Health Service at Los Angeles, California, on June 18, 1959, and had been certified by that Service as being afflicted with "Class A Psychopathic Personality"; that, according to the certification, this condition existed prior to and at the time of his August 1956 entry; that he had been afflicted with the desire for sexual relations with members of his own sex for the preceding 22 years; and that during those years he had indulged in such relations at periodic intervals, averaging about once a month (R. 71).

The evidence received at the reopened hearing, held on August 5 and 26, 1959 (R. 50–79), may be summarized as follows:

Respondent, through his counsel, acknowledged that he had been certified by the Public Health Service as having been afflicted with psychopathic personality both prior to and at the time of his August 1956 entry (R. 53–54, 71), and the Service's certificate, signed by Dr. Arthur Dahlgren, Senior Surgeon, was admitted in evidence (R. 54, 72–73). The record of a second conviction involving respondent, which, respondent admitted, was for the commission of another homosexual act (R. 37–38, 54–55, 74), was received (R. 55–56, 76–78). This was a conviction in the Los Angeles Municipal Court, on August 27, 1953, for having been, willfully and unlawfully, a lewd and dissolute person, in violation of Section 647(5) of the California Penal Code (R. 76–78).

In a sworn statement made by respondent before an investigator of the Immigration and Naturalization Service on March 25, 1959, which was received in evidence at the reopened hearing (R. 54–55, 74–75) and there acknowledged to be true (R. 55), respondent stated that he had had the urge to commit homosexual acts since he was about 24 years old; that he had indulged in such acts with other men in the intervening 22 years whenever the opportunity presented itself, which was usually about once a month or slightly less frequently; that these activities started while he was living in Switzerland and continued after he came to the United States; that his two convictions in Los Angeles, in 1953 and 1956 (see *supra*, pp. 4–5, 6), were based on homosexual acts; and that on a third occasion he had been arrested, in Oxnard, California, for similar activities,[3] but that the latter arrest was based "only on suspicion" and resulted in dismissal of the charges (R. 74–75). Ever since his second Los Angeles arrest, in 1956, he further stated, he had been "very careful" with respect to his homosexual activities because he had heard that such things were "reported to Washington" and he had felt that the immigration authorities might be "looking for" him (R. 75).

On respondent's behalf, there was received in evidence a report concerning respondent's psychiatric history and condition by his personal psychiatrist, Dr. David Harvey, in the form of a letter, dated August

[3] The Oxnard arrest apparently occurred on November 5, 1958 (see R. 38, 49).

10, 1959, to respondent's counsel (R. 6–8, 79). The report was based on the physician's examination of respondent on four occasions in May, June, July and August, 1959 (R. 6). The report acknowledged that respondent had had homosexual experiences since the age of 26, but stated that his "sexual drive—particularly at his age—is thought to be within his range of control, especially if he is under the supervision of continuing contact with a psychiatrist" (R. 7). His "socio-economic relationships" were said to have been "consistently good", and it was stated that he "does not frequent homosexual hang-outs, has no evident interest in youths, manifests no irresponsible trends, and has his main social contacts with respected members of the community" (*ibid.*). The report concluded that respondent's "deviation" was "not sufficient to justify the diagnosis of psychopathic personality"; that the "formal label would be that of: Sexual deviation, homosexuality, now under control" (R. 8).

Dr. Dahlgren, the Public Health Service surgeon who had signed the Service's certificate attesting to respondent's affliction with psychopathic personality (*supra*, p. 6), appeared in person and was cross-examined by respondent's counsel (R. 58–68). He testified that on the basis of his examination of respondent and a review of his history he had concluded that respondent was a sexual deviate, and that he had classified him as a psychopathic personality because the "Manual for Medical Examination of Aliens", the Public Health Service's official instruction book gov-

erning the examination of aliens, requires that sexual deviates be placed in this category (R. 60–64, 67). On cross-examination, Dr. Dahlgren stated that he had "no strong feeling" as to whether, under traditional medical usage, respondent would or would not be considered a psychopathic personality (R. 66). Since respondent was beyond question a sexual deviate, he said, and since the Public Health Service instructions require that such persons be classified as psychopathic personalities, he had no choice but to place respondent in this category (R. 67).

3. In an opinion dated September 22, 1959 (R. 79–86), the special inquiry officer, while concluding that the deportation charge contained in the original order to show cause (excludability at entry by reason of the prior commission of a crime involving moral turpitude) was not sustainable (R. 80–82), held that respondent was nevertheless deportable on the additional charge, *i.e.*, that at the time of his August 1956 entry he was excludable under Section 212(a)(4) of the Act as an alien afflicted with psychopathic personality because, on the undisputed evidence, respondent was, and at entry had been, a homosexual (R. 82–84). Deportation was accordingly ordered on the latter charge (R. 86). An appeal by respondent to the Board of Immigration Appeals was dismissed, with opinion, on November 20, 1959 (R. 86–90).

B. THE REVIEW PROCEEDINGS

1. On December 9, 1959, respondent commenced the present action against the Immigration and Naturalization Service's Los Angeles District Direc-

tor in the United States District Court for the Southern District of California, seeking declaratory and injunctive relief (R. 3–10). The complaint charged that the deportation order was invalid because it was not based on "reasonable, substantial and probative evidence" (R. 5). In opposing the government's motion for summary judgment, respondent advanced the additional contention that the term "psychopathic personality" in Section 212(a)(4) is "so vague and indefinite as to render the statute invalid and unconstitutional" (R. 17, 20–21). The matter was heard by a single district court judge,[4] who, on January 4, 1961, granted the government's motion for summary judgment (R. 19–21). The court, referring to the legislative history of Section 212(a)(4) as set forth in Judge Frank's concurring opinion in *United States* v. *Flores-Rodriguez,* 237 F. 2d 405, 412–413, n. 2 (C.A. 2),[5] observed that it was "clear" from that history that "Congress intended that sexual deviates would be classified by the enforcing agencies as psychopathic personalities" (R. 21; see *infra,* pp. 18–22), and found that there was "certainly * * * ample evidence" to support the administrative finding that respondent was a sexual deviate at the time of his 1956 entry (R. 20). The court rejected the contention based on the alleged vagueness of the term "psychopathic personality", observing that, while it might be true that a criminal statute employing such a term would be

[4] See note 6, *infra*, pp. 12–13.

[5] The legislative history is set forth in detail in the Argument, *infra*, pp. 18–22.

deemed unconstitutionally indefinite, the same strict standard should not be required of a statute defining aliens who are to be excluded from the United States (R. 21).

2. On April 17, 1962, the Court of Appeals for the Ninth Circuit set aside the deportation order and enjoined its enforcement (R. 100, 101), holding the term "psychopathic personality" void for vagueness as applied in this case. The court noted that the principle underlying the void-for-vagueness doctrine is that the exaction of obedience to a rule or standard which is so vague and indefinite as really to be no standard at all is violative of fundamental fairness. The court recognized that respondent's deportation had not been ordered because of any event or act committed by him after his entry in August 1956 but on the ground that, at the time of that entry, he was excludable because of a condition with which he was afflicted. But it observed that the Immigration and Naturalization Service, in making its finding as to the existence of that condition, had relied in part on behavior by respondent postdating both his 1952 and his 1956 entries (R. 95–96). Such reliance, it held, made the application of Section 212(a)(4) to respondent's case unfair since, so far as the record revealed, respondent's continuance of homosexual activities after he entered the country in 1952, and again in 1956, was not compulsive, but a matter of choice (R. 96). "[I]f, by reason of vagueness, the statute failed to advise him that homosexual practices conclusively evidence a 'psychopathic personality'," the court rea-

soned, "Fleuti was substantially prejudiced". For, "[a]s in the case of a vague criminal statute, he would thereby be deprived of notice that unless he refrained from such conduct harsh results might follow" (*ibid.*).

Having concluded, for the foregoing reasons, that this was a proper case for the application of the void-for-vagueness principle, the court went on to hold that the term "psychopathic personality" must be read without regard to its legislative history; that the term, when "measured by common understanding and practices", did "not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein"; and that the deportation order accordingly could not stand (R. 97–100).[6]

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[6] For the reasons noted in its opinion (R. 91–92, n. 1), the court considered the case as though it were before it for initial review of the deportation order (pursuant to Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (Supp. III) 1105a, and 5 U.S.C. 1031 *et seq.*) rather than as on appeal from the district court judgment. In brief, those reasons were as follows:

Under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (Supp. III) 1105a, which was added to the Act by Section 5(a) of the Act of September 26, 1961, 75 Stat. 651, it is provided that the procedure prescribed for the review of other federal agency orders (5 U.S.C. 1031 *et seq.*) shall henceforth be the sole and exclusive procedure for the judicial review of deportation orders. Section 5(b) of the 1961 Act provides that any judicial proceeding to review an order of deportation "which is pending unheard" in any district court on the effective date of that section (October 26, 1961)—with exceptions not relevant—shall be transferred for determination to the court of appeals having jurisdiction to entertain a petition for review under that section. The instant case was disposed of by the district court prior to October 26, 1961;

SUMMARY OF ARGUMENT

I

The legislative history of the Immigration and Nationality Act shows that Congress intended to exclude alien homosexuals—a class of which respondent is, and at entry was, an acknowledged member—as persons within the general category "[a]liens afflicted with psychopathic personality." The early bills, which eventuated in the Act, provided for the exclusion of homosexuals and sex perverts in explicit

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therefore, transfer of the case to the court of appeals under the statutory provision referred to was not required at that time. The court of appeals noted, however, *sua sponte*, that, because respondent had sought to restrain the enforcement of a deportation statute on the ground that the statute was unconstitutional as applied to him, the case should have been heard by a district court of three judges, pursuant to 28 U.S.C. 2282, rather than by a single judge, as had been done in this case. But if the court of appeals were then to remand the case to the district court because of the failure to convene a three-judge court, it would become a judicial proceeding "pending unheard" in the district court, with the consequence that it would then be necessary for the district court to transfer the case back to the court of appeals as provided in Section 5(b) of the 1961 Act. To avoid such circuity, the court of appeals decided that it would consider the case as though it had been remanded to the district court and transferred back to the court of appeals, and thus already before the latter court as on initial judicial review pursuant to the recently enacted legislation referred to above.

We agree that this procedural disposition was correct, for the reasons stated by the court. It may be pointed out, moreover, that, in any event, since the issue on the merits involves a pure question of law, it makes no practical difference whether the case be deemed to have been before the court of appeals on direct review of an agency order or on appeal from an intervening district court judgment.

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terms. On the basis of recommendations of the Public Health Service, which advised that homosexuality and sex perversion, where clearly manifested, are considered types of psychopathic personality, the draftsmen of the legislation omitted the specifications contained in earlier drafts, but carefully explained that the "change of nomenclature" was "not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."

II

The court of appeals erred in applying the void-for-vagueness principle to the deportation proceedings in this case. It held that evidence of respondent's acts in the United States could be considered by the Immigration and Naturalization Service as bearing upon his condition at the time of entry only if he was properly warned by the statutory terms themselves that such evidence would be relevant to determining whether he had properly been admitted and thus whether he could be deported. This holding is erroneous for three separate reasons.

A. The constitutional requirement of fair warning applies only to statutes regulating conduct or imposing sanctions upon conduct; it does not apply to a statute, such as Section 212(a)(4) of the Immigration and Nationality Act, which merely prescribes standards for the admission of aliens. As guides to adjudication, all statutes must, of course, be sufficiently definite to provide judges, juries, and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly and consistently and in

accordance with the legislative intent. Here, the legislative history makes absolutely clear that Congress intended Section 212(a)(4) to apply to homosexuals. Some statutes serve, in addition, to give guidance to individuals in conforming their conduct to established standards of behavior. It is with respect to such statutes that the void-for-vagueness principle had its origin and with which it has been most often concerned. This principle—that a person is entitled to know, before he acts, what conduct the law forbids or requires—has no application to the present case, where the statutory ground for expulsion is not the alien's conduct after entry, but his *condition at the time of entry.*

B. Even if respondent had been ordered deported because of his post-entry conduct and not, as is plainly the case, because of his excludable status at the time of entry, he could not object to any lack of clarity in the deportation statute read on its face. Congress may enact grounds of deportation retroactively, and thereby render an alien deportable for past conduct which did not entail deportability when it occurred. Congress could, therefore, pass a retroactive statute making past homosexual conduct by an alien within the United States grounds for his deportation. This being so, respondent's argument as to lack of notice necessarily fails.

C. Even if the constitutional requirement of fair warning were not wholly inapplicable to a deportation proceeding turning on whether the alien was properly admitted to the United States, this requirement would

plainly be far less stringent in a case such as this than where the statute is required to give notice of criminal sanctions. This Court has considered the prior construction of a State statute by the highest court of the State as fixing the statute's meaning when it was attacked as void for vagueness, and has similarly considered the legislative histories of statutes in rejecting challenges based on that ground. The present case would not involve essentially different considerations, even if our basic contention, that the vagueness principle is wholly inapplicable, were unsound.

ARGUMENT

Respondent has been ordered deported, under Section 241(a)(1) of the Immigration and Nationality Act (*supra*, pp. 2–3), as an alien who, at the time of entry, was within a class of aliens who were excludable by the law existing at the time of such entry. The "entry" involved is respondent's reentry in August 1956 (see *supra*, p. 4), and the basis of excludability is one of the grounds specified by Section 212(a)(4) of the Act (*supra*, p. 2), *viz.*, "[a]liens afflicted with psychopathic personality".

It should be noted, preliminarily, that the fact that the entry in question was a reentry, as distinguished from an original entry,[7] is immaterial. "Entry" is a term of art in immigration law and includes "any com-

[7] Respondent's original entry occurred on October 9, 1952 (R. 14). The evidence introduced at the deportation hearing indicated that the psychophysical condition on which the deportation order was predicated, homosexuality, existed at the time of the original entry as well as at the time of the August 1956 reentry—and in fact had been present for at least 16 years pre-

ing of an alien from a foreign country into the United States whether such coming be the first or any subsequent one". *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425. This concept has been substantially adopted in the 1952 Act's definition of "entry" as meaning (§ 101(a)(13), 66 Stat. 167, 8 U.S.C. 1101 (a)(13)):

> any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by the deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

Thus, unless Congress has otherwise provided, an alien seeking reentry must meet all conditions of admission specified by Congress for initial entrants. If he falls within any of the inadmissible classes, his deportation is required by Section 241(a)(1). Apart from alienage, which is not questioned here, the sole issue pre-

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viously (see *supra*, pp. 6–9). However, the original entry, while it occurred after the enactment of the Immigration and Nationality Act (June 27, 1952), took place prior to its effective date (December 24, 1952) (§ 407, 66 Stat. 281).

sented in such a situation is whether the alien was excludable by then existing law.

I

RESPONDENT IS AN ACKNOWLEDGED MEMBER OF A CLASS OF ALIENS (HOMOSEXUALS AND OTHER SEXUAL DEVIATES) WHOM CONGRESS INTENDED TO EXCLUDE FROM THIS COUNTRY BY SECTION 212 (a)(4) OF THE IMMIGRATION AND NATIONALITY ACT, AS SHOWN BY THE LEGISLATIVE HISTORY OF THAT SECTION

That Congress intended the term "[a]liens afflicted with psychopathic personality," as used in Section 212 (a)(4) of the 1952 Immigration and Nationality Act, to include homosexuals and other types of sexual deviates is conclusively demonstrated by the legislative history of the section.[8]

The term first appeared in the immigration laws in the 1952 Act. Under prior law, the corresponding

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[8] The pertinent history here reviewed is also cited in Judge Frank's concurring opinion in *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412–413, n. 2 (C.A. 2) (to which reference was made by the district court in this case (R. 21)), as well as in *Matter of P——*, 7 I & N Dec. 258, 261–264 (1956). In view of the unambiguous legislative history, the courts which have considered the question have had no difficulty in concluding that aliens "afflicted with psychopathic personality", as the term is used in Section 212(a)(4), includes aliens who are homosexuals. See *Quiroz* v. *Neelly*, 291 F. 2d 906 (C.A. 5); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412–416 (C.A. 2) (concurring opinion); *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565 (S.D. N.Y.), affirmed *sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F. 2d 330 (C.A. 2), certiorari denied, 364 U.S. 824.

term, describing a class of aliens excludable because of a psychopathic disorder, had been "persons of constitutional psychopathic inferiority" (Act of February 5, 1917, § 3, 39 Stat. 875, as amended, 8 U.S.C. (1946 ed.) 136(a)). In addition, persons who were found to be, and certified as, "mentally * * * defective" were excludable under then existing law (*id.*, 8 U.S.C. (1946 ed.) 136(d)). In 1950, a subcommittee of the Senate Committee on the Judiciary, in a comprehensive study of the immigration laws, reported:

> The present clauses excluding mentally and physically defective aliens, with three exceptions, are sufficiently broad to provide adequate protection to the population of the United States, without being unduly harsh or restrictive. The subcommittee believes, however, that the purpose of the provision against "persons with constitutional psychopathic inferiority" will be more adequately served by changing that term to "persons afflicted with psychopathic personality", and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts. * * * [S. Rep. 1515, 81st Cong., 2d sess., *The Immigration and Naturalizations Systems of the United States*, Report of the Committee on the Judiciary Pursuant to S. Res. 137, 80th Cong., 1st sess., as amended (*A Resolution to Make an Investigation of the Immigration System*), April 20, 1950, p. 345.]

As a result of this study, S. 3455, 81st Cong., 2d sess., was introduced in the Senate on April 20, 1950. Section 212(a) of the bill provided in pertinent part:

> SEC. 212. (a) The following classes of aliens shall be excluded from admission into the United States:
>
> (1) Aliens who are idiots, imbeciles, feeble-minded, epileptics, or insane;
>
> * * * * * *
>
> (3) Aliens afflicted with psychopathic personality;
>
> * * * * * *
>
> (7) Aliens who are homosexuals or sex perverts;
>
> (8) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a mental defect * * *.

S. 716, 82d Cong., 1st sess., a revised version of S. 3455, introduced on January 29, 1951, was identical with the earlier bill in relevant part. However, when S. 2550, 82d Cong., 2d sess., a further modification of the predecessor bills, was introduced on January 29, 1952, the above-quoted subsection had been dropped and Section 212(a), phrased as it was later enacted into law, provided, in pertinent part, as follows:

> SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> (1) Aliens who are feeble-minded;
>
> (2) Aliens who are insane;
>
> * * * * * *

> (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;
>
> * * * * *

In explanation of the omission of the category "[a]liens who are homosexuals or sex perverts", which had appeared in the predecessor bills, the committee report accompanying S. 2550 stated (S. Rep. 1137, 82d Cong., 2d sess., p. 9):

> Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.* [Emphasis added.]

The advice of the Public Health Service mentioned in this Report appears in H. Rep. 1365, 82d Cong., 2d sess., accompanying H.R. 5678 (the bill which was eventually enacted). The Service was commenting on the "medical aspects" of H.R. 2379, 82d Cong., 1st sess., a predecessor bill and companion to S. 716. Like S. 716, H.R. 2379 included, as separate excludable categories, "[a]liens afflicted with psychopathic personality," "[a]liens who are homosexuals or sex perverts," and aliens not within either of those classes (or other

class specified in the bill) who were certified by the examining physician as having "a mental defect." The Public Health Service recommended that "[a]liens who are homosexuals or sex perverts" be eliminated as a separate category, and that the language of the bill be changed to read, in pertinent part, "[a]liens afflicted with psychopathic personality * * * or a mental defect"—the phraseology ultimately enacted (H. Rep. 1365, 82d Cong., 2d sess., p. 46). The Service indicated in an accompanying explanatory comment its belief that the suggested language would encompass the objective of the bill as reflected in the three separate categories referred to above, and its understanding that homosexuality and sex perversion, where clearly manifested, are ordinarily to be considered as types of psychopathic personality (*id.*, p. 47).[9] The House Judiciary Committee, in reporting out H. R. 5678 (in the form in which it was enacted into law, so far as is relevant), indicated that it had followed the Public Health Service's recommendations (*id.*, p. 48).

It thus conclusively appears from the legislative history of the 1952 Act that Congress intended the phrase "[a]liens afflicted with psychopathic personality" in Section 212(a)(4) to include within its scope homosexuals and other sexual deviates. And since respondent, as we have seen, is admittedly a sexual deviate and homosexual, and was such at entry, it follows that he is a member of a class of aliens whom Congress decided to exclude.

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[9] The relevant portions of the Public Health Service's report are set forth in the Appendix, *infra*, pp. 38–40.

II

THE COURT OF APPEALS ERRED IN APPLYING THE VOID-FOR-VAGUENESS PRINCIPLE TO THE DEPORTATION PROCEEDINGS IN THIS CASE

The court of appeals did not question the conclusion that Congress, in enacting Section 212(a)(4), proposed to exclude sexual deviates. The court held, however, that in making its finding that respondent was, at the time of entry, a member of an excludable class (homosexuals), the Immigration and Naturalization Service had relied in part upon evidence that could not constitutionally be considered. Evidence of Fleuti's acts in the United States could, the court held, be considered as bearing upon his condition at the time of entry only if Fleuti was properly warned, by the face of the statute, that such evidence would be relevant to determining whether he had properly been admitted and thus whether he could be deported.

One complete answer to the court's holding is that, while the administrative finding as to respondent's excludable status in 1956 was supported in part by evidence of his conduct in this country since his initial entry in 1952, the result would necessarily have been the same had no such post-entry evidence been introduced. Respondent himself had admitted that he was a homosexual at the time of entry and had regularly engaged in homosexual conduct for many years prior to his initial entry. This evidence alone would have required his deportation without regard to any post-entry conduct. But even apart from this evidentiary consideration, the Ninth Circuit's holding, we submit,

is legally untenable. This is so for three separate reasons.

A. THE CONSTITUTIONAL REQUIREMENT OF FAIR WARNING APPLIES TO STATUTES REGULATING CONDUCT OR IMPOSING SANCTIONS UPON CONDUCT, BUT DOES NOT APPLY TO A STATUTE, SUCH AS SECTION 212(a)(4), WHICH MERELY PRESCRIBES STANDARDS FOR THE ADMISSION OF ALIENS

The requirement that a statute be clear and definite is based upon two fundamental considerations: (1) Statutes guide courts and administrative tribunals in the adjudication of various rights, duties and liabilities; (2) they may also serve as guides to the individuals subject to them in planning their future conduct.[10]

1. As guides to adjudication, statutes must be sufficiently definite to provide judges, juries, and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly and consistently in accordance with the legislative intent. *United States* v. *Petrillo*, 332 U.S. 1, 7; *Minnesota* v. *Probate Court*, 303 U.S. 270; *Mahler* v. *Eby*, 264 U.S. 32, 40–41. A deportation statute, like any other, can be challenged on the ground that it provides neither the administrative authorities nor the courts with any reliable basis for determining what classes of aliens are deportable and thus improperly leaves the selection of deportable aliens to the caprice of administrative officials. But such a challenge cannot be made in reliance on the face of the statute alone. It is the courts' function to con-

[10] For a discussion of these considerations, see Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948); cf. *United States* v. *Petrillo*, 332 U.S. 1, 7; *Musser* v. *Utah*, 333 U.S. 95, 97.

strue the statute to ascertain what the legislature intended by the words it used; and, in determining the legislative intent, the courts may consider any relevant evidence, including the legislative history of the provision in question. Thus, the courts, in construing the coverage of the federal laws relating to exclusion and deportation, have frequently consulted the legislative history, historical background and similar materials for the purpose of ascertaining more precisely the types of persons Congress intended to encompass within a specified excludable or deportable class. See, *e.g., Rowoldt* v. *Perfetto*, 355 U.S. 115, 120; *Galvan* v. *Press*, 347 U.S. 522, 526–528; *Knauff* v. *Shaughnessy*, 338 U.S. 537, 545–547; *Holy Trinity Church* v. *United States*, 143 U.S. 457, 462–465.

Here, as we have shown, the legislative history of the statutory provision in question shows beyond a doubt that Congress intended to exclude persons afflicted with the particular psychophysiological disorder with which respondent is affected, the urge to have homosexual relations. The primary function of the requirement of definiteness—the facilitation of adjudication—is thus fulfilled in this case. For this reason, the court of appeals (R. 98–100) erred in thinking it material that there are differences of opinion among psychiatrists as to the precise meaning and scope of the term "psychopathic personality." As the Court of Appeals for the Fifth Circuit, in *Quiroz* v. *Neelly*, 291 F. 2d 906, 907, remarked in sustaining the deportation of a homosexual alien under the same provisions as those involved here—

> Whatever the phrase "psychopathic personality" may mean to the psychiatrist, to the Congress it was intended to include hom sexuals and sex perverts. It is that intent which controls here.

It is not necessary for purposes of this case to delineate the full scope of the phrase "afflicted with psychopathic personality" as used in Section 212(a)(4). It is enough that the legislative history establishes that Congress intended it to cover persons with the particular disorder (homosexuality) with which respondent is afflicted. That there may be doubt as to the applicability of the term to persons with other types of psychophysical defects or disorders is not a reason for failing to apply it here. If there be doubt as to whether the term embraces persons with different psychic traits or disorders, "it will be time enough," as this Court observed (considering another statute) in *United States* v. *Wurzbach*, 280 U.S. 396, 399, "to consider [the matter] when raised by someone whom it concerns." See also, *e.g.*, *United States* v. *Petrillo*, 332 U.S. 1, 7, 9–12; *Williams* v. *United States*, 341 U.S. 97, 101; *Jordan* v. *De George*, 341 U.S. 223, 232; *Dennis* v. *United States*, 341 U.S. 494, 516.

2. Although all statutes must guide adjudication, some must serve, in addition, to give guidance to individuals with respect to their future conduct. Many statutes, for example, require the performance or avoidance of specified acts. Elementary fairness requires that such acts be described in the statute with

sufficient precision to give the individual adequate notice of what conduct he must either perform or avoid. It is with respect to this function of statutes that the void-for-vagueness principle had its origin and with which it has been most often concerned. This is made clear by this Court's statement of the principle in *United States* v. *Harriss*, 347 U.S. 612, 617:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Similarly, in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, the Court declared:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

In a multitude of other decisions this Court has similarly stressed that the "constitutional requirement of definiteness" in a statute (*United States* v. *Harriss*,

supra, at 617) flows from the fact that it is the function of the statute to serve as a guide for conduct."[11] Although the principle is primarily associated with cases involving criminal statutes, it has also been applied to statutes imposing civil sanctions.[12] See, *e.g.*, *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239; *Miller* v. *Strahl*, 239 U.S. 426, 434; but cf. *Levy Leasing Co.* v. *Siegel*, 258 U.S. 242, 249–250. There, again, the Court has stressed that the invalidity of the statute challenged was a consequence of the fact that, though the enactment purported to estab-

[11] *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U.S. 86, 108–111; *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 221–223; *Collins* v. *Kentucky*, 234 U.S. 634, 637–638; *Fox* v. *Washington*, 236 U.S. 273, 277; *Miller* v. *Strahl*, 239 U.S. 426, 434; *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89–93; *Weeds, Inc.* v. *United States*, 255 U.S. 109, 110–111; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501–503; *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 238–242; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 457–465; *United States* v. *Wurzbach*, 280 U.S. 396, 399; *Smith* v. *Cahoon*, 283 U.S. 553, 564; *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 241–243; *Herndon* v. *Lowry*, 301 U.S. 242, 261–264; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453–458; *United States* v. *Ragen*, 314 U.S. 513, 523–524; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573–574; *Screws* v. *United States*, 325 U.S. 91, 101–104; *United States* v. *Petrillo*, 332 U.S. 1, 5–8; *Musser* v. *Utah*, 333 U.S. 95, 96–97; *Winters* v. *New York*, 333 U.S. 507, 515–520; *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340; *United States* v. *Spector*, 343 U.S. 169, 171–172; *United States* v. *Cardiff*, 344 U.S. 174, 176–177; *United States* v. *Kahriger*, 345 U.S. 22, 33–34; *Roth* v. *United States*, 354 U.S. 476, 491–492.

[12] A higher standard of certainty, however, is required in the case of a criminal statute. *Winters* v. *New York*, 333 U.S. 507, 515; cf. *Mahler* v. *Eby*, 264 U.S. 32, 41.

lish a rule of conduct, it was too vague to give adequate guidance. Thus, in *Small Co.* v. *American Sugar Refining Co., supra,* the Court stated (267 U.S. at 239):

> The defendant attempts to distinguish those cases [prior decisions of the Court holding criminal statutes invalid on grounds of vagueness] because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. * * *

The rule that a person is entitled to know, before he acts, just what conduct the law forbids or requires has no application, however, to the present case. Here the statutory ground for expulsion is not the alien's conduct after entry, but his *condition at the time of entry.* Congress has plenary authority to make rules and regulations for the admission of aliens and to establish categories of aliens who shall be excluded or deported, either absolutely or on such conditions as it may prescribe. *The Chinese Exclusion Case,* 130 U.S. 581; *Fong Yue Ting* v. *United States,* 149 U.S. 698; *Knauff* v. *Shaughnessy,* 338 U.S. 537; *Carlson* v. *Landon,* 342 U.S. 524; *Harisiades* v. *Shaughnessy,* 342 U.S. 580. This authority includes without question the power to exclude aliens applying for admission whom Congress deems undesirable because of some mental or physical condition and to direct their deportation if their inad-

missibility is discovered only after entry has been effected.[13] Section 212(a) (8 U.S.C. 1182(a)) is in large measure a catalog of such disqualifying conditions.[14] These provisions of the statute are in no sense guides to conduct, and the application to them of the principle requiring definiteness in behavior-governing statutes can have no rational justification.

It is the duty of the administrative authorities inquiring into an alien's admissibility to determine whether he is afflicted with any of the named conditions; and if they have any doubt as to the meaning of any of the statutory terms employed, there is no reason why they should not look to any available source, including the legislative history of a particular provision, to ascertain more precisely the legislative intent. If the issue arises, as here, in a deportation proceeding (based on excludability at time of entry), as distinguished from an exclusion proceeding, the inquiry is the same: Is the alien within a class which Congress has directed to be excluded? The deporta-

[13] Even those critics who have questioned the power of Congress to deport aliens for post-entry activities do not doubt that aliens inadmissible at the time of entry may later be properly expelled. See, *e.g.*, Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 68 Yale L. Journ. 1578, 1580, 69 Yale L. Journ. 262 (1959); cf. Boudin, *The Settler Within Our Gates*, 26 N.Y.U.L. Rev. 266, 26 N.Y.U.L. Rev. 451, 466–467, 26 N.Y.U.L. Rev. 634, 656–657 (1951).

[14] In addition to aliens afflicted with psychopathic personality, Section 212(a) requires the exclusion, for example, of "feebleminded" persons, the "insane," those who have had "one or more attacks of insanity," those suffering from "epilepsy" or a "mental defect," "narcotic drug addicts," "chronic alcoholics," those "afflicted with tuberculosis in any form," those suffering from "leprosy, or any dangerous contagious disease," etc.

tion provision of Section 241(a)(1), here geared to inadmissibility under Section 212(a)(4), requires the determination of only one question: What was the alien's condition at the time of entry? If it is found, by the requisite evidence, that the alien was then afflicted with psychopathic personality, in the sense that Congress used the term, deportability is established.

The decision below sought to avoid the conclusion that Sections 212(a)(4) and 241 (a)(1), since they do not purport to govern behavior, need not provide clear warning to aliens excluded or deported by pointing out that, "[w]hile the post-entry conduct [of respondent] was not itself the ground of deportation," such conduct "was used as evidence of a pre-entry deportable condition"—with the consequence, it is said, that respondent was prejudiced by the vagueness of the term "psychopathic personality" in the challenged provision (R. 96–97). The court reasoned that since, "[i]nsofar as the record reveals, continuance of homosexual practices after Fleuti entered this country in 1952, and again in 1956, was not compulsive, but was a matter of choice," he might not have engaged in such practices in this country had he been adequately warned by the statute that "harsh results," *i.e.*, deportation, might follow if he did not refrain from such conduct (R. 96). See, also, the Statement, *supra*, pp. 11–12.

The court below, of course, recognized that respondent's post-entry conduct was not the basis for his deportation, but was only evidence of his condition

at the time of entry. What it has done is to extend—in a way which we believe unprecedented—the doctrine of unconstitutional vagueness. It has fashioned it into a rule which protects the alien from inadvertently furnishing evidence bearing upon his condition at the time of entry. Under the court of appeals' holding, it would be unconstitutional for the administrative authorities to consider any evidence that might not have been available had respondent known of the deportability of aliens who were homosexuals at the time of entry. Thus, such post-entry evidence as a letter describing the alien's pre-entry conduct, or evidence of treatment voluntarily undertaken, or statements made to employers or other parties would have to be excluded for precisely the same reasons that the court considered evidence of homosexual acts inadmissible.

Not only does no precedent exist for such an extension of the void-for-vagueness rationale, but the decision cannot be justified in principle. The void-for-vagueness doctrine is a canon of fairness designed to ensure that no person shall incur a sanction, civil or criminal, for failure to conform his conduct to a statutory rule of action seeking to regulate his future behavior, unless the command of the statute is sufficiently clear that persons of normal intelligence will know what conduct is forbidden and what allowed. It is *not* a device to enable persons having defined characteristics, physical or psychic, or suffering from specified physical or mental diseases or defects, to conduct themselves so as to avoid making these conditions manifest.

B. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT CONGRESS, WHICH MAY ENACT GROUNDS OF DEPORTATION RETROACTIVELY, MUST MAKE THE GROUNDS OF DEPORTATION CLEAR ON THEIR FACE

Even if respondent had been ordered deported because of his post-entry conduct and not, as is plainly the case, because of his excludable status at the time of entry, he could not object to the lack of clarity of the deportation statute read on its face. An alien whom the government seeks to deport is of course entitled, as a matter of procedural due process, to notice of the charges he must face at the deportation hearing. But it does not follow that, before he can become liable to deportation, Congress must first warn him of the classes which are deportable so that he may guide himself accordingly. Congress, as this Court has repeatedly held, may enact grounds of deportation retroactively, and thereby render an alien deportable for past conduct which did not entail deportability when it occurred. *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; *Marcello* v. *Bonds*, 349 U.S. 302; *Lehmann* v. *Carson*, 353 U.S. 685; *Mulcahey* v. *Catalanotte*, 353 U.S. 692. See, also, *Bugajewitz* v. *Adams*, 228 U.S. 585, 591; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280; *Mahler* v. *Eby*, 264 U.S. 32, 37, 39; *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 529.

Under these decisions it is, we believe, settled that Congress could pass a statute retroactively making any homosexual conduct within the United States grounds for deportation of the alien. This being so, there can be no doubt that Congress could constitutionally make future homosexual conduct grounds for

deportation whether or not it expressed its intention in a way that was not only clear to the administrative authorities and the courts, but also plain to resident aliens without recourse to the legislative history of the statute.

We recognize that in *Jordan* v. *De George*, 341 U.S. 223, 231–232, this Court in fact examined, on grounds of inadequate warning, a statute making deportability turn on post-entry conduct. That decision, however, preceded the recent decisions reaffirming the power of Congress to enact grounds of deportation retroactively, and the implications of that power with respect to the issue before the Court were not considered; the question of fair warning was not discussed in the briefs of the parties and the Court's consideration of the question appears to have been elicited by a dissent which was primarily based, not on the fact that the somewhat vague deportation provision provided inadequate warning, but on the lack of sufficiently clear standards to be applied by the administrative officials and courts;[15] and the meaning of the statutory provision could in no way be clarified by recourse to the legislative history.

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[15] In *Mahler* v. *Eby*, 264 U.S. 32, a statute which authorized the Secretary of Labor to deport aliens (of designated classes) whom he found, after hearing, to be "undesirable residents of the United States" (Act of May 10, 1920, § 1, 41 Stat. 593) was sustained as against a charge that it was unconstitutionally vague. The challenge to the statute was based, however, not on the ground that it provided no ascertainable standard of conduct for aliens to follow if they wished to avoid deportation, but on the ground that, by reason of the vagueness of the criterion of deportability, it amounted to an invalid delegation of legislative power to an executive officer (264 U.S. at 40).

In sum, the decisions of this Court establish that Congress could retroactively make homosexual conduct within the United States grounds for revocation of the statutory permission to remain and for deportation. It can therefore make such conduct grounds for deportation in a statute to be applied prospectively, whether or not the statute is clear on its face. *A fortiori*, Congress can constitutionally make evidence of homosexual conduct in the United States relevant to a determination of whether the alien was admissible to the country at the time of entry, whether or not the alien is advised of this relevance by the face of the statute.

C. SECTION 212(a)(9)(C)(i), INTERPRETED IN LIGHT OF ITS LEGISLATIVE HISTORY, PROVIDES ADEQUATE NOTICE THAT AN ALIEN WHO IS A HOMOSEXUAL IS NOT ADMISSIBLE TO THE UNITED STATES AND MAY BE DEPORTED IF ERRONEOUSLY ADMITTED

Finally, even if the constitutional requirement of fair warning were not wholly inapplicable to a deportation proceeding turning on whether the alien was properly admitted to the United States, this requirement would plainly be far less stringent in a case such as this than where the statute is required to give notice of criminal sanctions. Cf. *Winters v. New York*, 333 U.S. 507, 515. Thus the type of notice constitutionally required prior to deportation of an alien such as respondent would have to be determined in light of the following: respondent is being deported because he was improperly admitted, and not on the basis of his conduct in the United States; he was entitled to no warning of the requisite standards for admission; Congress may retroactively, and thus entirely without

warning, make even post-entry conduct grounds for revocation of its permission for the alien to remain in the United States. In this light and in view of this Court's prior decisions in cases where the claim of unfairness resulting from absence of warning was far less attenuated, we submit that there can be no constitutional requirement that Section 212(a)(4) be plain on its face without recourse to its legislative history.

This Court has considered the prior construction of a State statute by the highest court of the State as fixing the statute's meaning when it was attacked as void for vagueness. See, *e.g.*, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572–574.[16] Similarly, a statute's legislative history can be used to lend certainty to an otherwise insufficiently definite statute. See, *e.g.*, *United States* v. *Harriss*, 347 U.S. 612, 620–623, where the legislative history of the Federal Reg-

[16] Indeed, the Court has even considered the construction placed on the statute by the State's courts in the proceedings on review of the accused's conviction—*after* he has acted. In such decisions as *Fox* v. *Washington*, 236 U.S. 273, 277, *Cox* v. *New Hampshire*, 312 U.S. 569, 575–576, *Winters* v. *New York*, 333 U.S. 507, 512–5[illegible] *Kovacs* v. *Cooper*, 336 U.S. 77, 84–85, and *Cole* v. *Arkansas*, 338 U.S. 345, 348–349, 354, the Court, in applying the test of definiteness to state criminal statutes, has treated the statute in each instance as though it's text bore the interpretive gloss placed on it by the highest court of the State in the very proceeding in which the litigant before the bar had appealed from his conviction—in other words, after the commission of the act for which he had been brought to trial. See, *e.g.*, *Winters* v. *New York*, *supra*, 333 U.S. at 514–515: "We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation."

ulation of Lobbying Act was cited by the Court in rejecting a challenge to the constitutionality of the Act on grounds of indefiniteness; and *Screws* v. *United States*, 325 U.S. 91, 98–104, where the legislative history of Section 20 of the Criminal Code was considered in construing the section narrowly enough to obviate a charge of unconstitutional vagueness. There can therefore be no doubt that respondent, whose right to statutory notice is, at best, far less clear, could fairly be required to have recourse to the legislative history of Section 212(a)(4), which states with unusual clarity that homosexuals are excluded from admission to the United States.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the order of deportation reinstated.

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APPENDIX

Report of the Public Health Service on the medical aspects of H.R. 2379, a bill to revise the laws relating to immigration, naturalization, and nationality, and for other purposes (H. Rep. 1365, 82d Cong., 2d sess., pp. 46–48):

It is recommended that the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

1. Aliens who are idiots, imbeciles, or morons.
2. Aliens who are insane.
3. Aliens who have had one or more attacks of insanity.
4. Aliens afflicted with psychopathic personality, epilepsy, or a mental defect.
5. Aliens who are narcotic drug addicts or chronic alcoholics.
6. Aliens who are afflicted with tuberculosis in any form, or with leprosy or any other dangerous contagious disease.
7. Aliens certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living.

The following comments are submitted:

* * * * *

Psychopathic personality.—Some comments should be expressed regarding the term "psychopathic personality." Although the term "pyschopathic personality," used in classifying certain types of mental disorders, is vague and indefinite, no more appropriate expression can be suggested at this time. The conditions clas-

sified within the group of psychopathic personalities are, in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or emotional symptoms. Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends, or are persons ill primarily in terms of society and the prevailing culture. The latter or sociopathic reactions are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation. Until a more definitive expression can be devised, the term "psychopathic personality" should be retained.

Epilepsy.—* * *

* * * * *

Sexual perverts.—The language of the bill lists sexual perverts or homosexual persons as among those aliens to be excluded from admission to the United States. In some instances considerable difficulty may be encountered in substantiating a diagnosis of homosexuality or sexual perversion. In other instances where the action and behavior of the person is more obvious, as might be noted in the manner of dress (so-called transvestism or fetishism), the condition may be more easily substantiated. Ordinarily, a history of homosexuality must be obtained from the individual, which he may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis. The detection of persons with more obvious sexual perversion is relatively simple. Considerably more difficulty may be encountered

in uncovering the homosexual person. Ordinarily, persons suffering from disturbances in sexuality are included within the classification of "psychopathic personality with pathologic sexuality." This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc. In those instances where the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect.

Mental defect.—The utilization of the term "mental defect" serves a very useful purpose and should be continued within the language of the bill. It should be pointed out that in using this expression, "mental defect," it has or bears no relationship to mental deficiency which is related to the intellectual status of the individual. The term "mental defect," although broad and sweeping, is a safeguard for classifying those aliens who would not fit into the categories listed above. For example, there is a fairly large group of hereditary disturbances which at the time of examination could not be included in the above classification. This expression could also be utilized in classifying progressive personality disorders which occur in such conditions as infections of the nervous system; for example, in behavior disorders of epidemic encephalitis. Such a term could also be used to cover the more severely disabling neuroses and conduct and habit disorders of adults and children. It can be used in classifying those persons who are likely to be brought into repeated conflict with social customs, authority, or society in general. It is, therefore, recommended that the expression "as having a mental defect" be retained within the language of the bill.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 248

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA,

Petitioner,

vs.

GEORGE FLEUTI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1962

No. 248

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA,

Petitioner,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the court of appeals [R. 91-100] is reported at 302 F. 2d 652.[1] The opinion of the district court [R. 19-21] is not reported. The opinion and order of the Board of Immigration Appeals appear at R. 86-90. The opinion, findings of fact, conclusions of law, and order of the special inquiry officer of the Immigration and Naturalization Service appear at R. 79-86.

[1]The Transcript of Record which has been lodged with the Clerk of the Court by petitioner consists of a single volume of 102 pages consecutively paginated. This record shall hereinafter be referred to as "R."

Jurisdiction.

The judgment of the court of appeals was entered on April 17, 1962 [R. 101]. The petition for a writ of certiorari was filed on July 13, 1962, and was granted on October 15, 1962 [R. 102]. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

Question Presented.

Respondent was ordered deported on the ground that he was excludable by law at the time of his re-entry as "afflicted with psychopathic personality" because he was a homosexual. The finding that he was a homosexual was based in part upon evidence of his conduct within the United States. The question presented is whether the deportation order, in these circumstances, deprived respondent of his liberty without due process because the vagueness of the term "afflicted with psychopathic personality" did not accord him fair warning of conduct to be avoided.

Statutes Involved.

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U. S. C. 1182(a)(4), provides in pertinent part:

> SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * *
>
> (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;
>
> * * * * * *

Section 241(a)(1) of the same Act, 66 Stat. 204, 8 U. S. C. 1251(a)(1), provides in pertinent part:

SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

Section 112(a)(13) of the same Act, 66 Stat. 166, U. S. C. 1101(a)(13), provides in pertinent part:

SEC. 112(a) As used in this chapter—

* * * * *

(13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary.

* * * *

Statement.

Respondent, George E. M. Fleuti, a fifty (50) year old native and citizen of Switzerland was admitted to the United States as a permanent resident on October 9, 1952. He has continuously resided here since that time except for a brief visit of a few hours to Ensenada, Mexico, sometime during the month of August, 1956 (there is no official record of such visit-respondent volunteered such information to an investigator of the Immigration and Naturalization Service [R. 74].

Respondent's training includes experience in administrative hotel work in Europe, in Los Angeles, California, and in Ojai, California, where he is presently employed. His present employers indicate that respondent's conduct and service as Front Office Manager of the Ojai Valley Inn and Country Club has, in all respects, been superior and that his honesty and integrity is exemplary [R. 45].

The charges of deportability arose out of a misdemeanor conviction in the Superior Court of the State of California in and for the County of Los Angeles for a violation of Section 288(a) of the Penal Code of California on March 9, 1956 [R. 44]; and a misdemeanor conviction in the Municipal Court, Los Angeles County, California, on August 27, 1953, for violation of Section 647(5) of the California Penal Code [R. 78].

On April 20, 1959, following a hearing before a special inquiry officer of the Immigration and Natural-

ization Service [R. 30-41], respondent was ordered deported pursuant to the provisions of Section 212(a)(1) of the Immigration and Nationality Act as an alien who, at the time of his August, 1956 re-entry, was excludable on the ground that he had been convicted of a crime involving moral turpitude (and therefore excludable at the time of re-entry under Section 212-(a)(9) of the Act, 8 U. S. C. 1182(a)(9). [R. 42]. Subsequently, a motion was made, wherein it was conceded by an examining officer of the Immigration and Naturalization Service that respondent's petty offense on August 27, 1953, did not constitute a sufficient basis for exclusion at the time of his August, 1956 re-entry, as under the applicable statutes, *supra*; the offense was not considered a crime involving moral turpitude.

By reason of the aforementioned convictions, the Service requested that the hearing be reopened for the presentation of further evidence and for further determination of deportability [R. 47-49]. The motion was granted by a special inquiry officer [R. 50] and the reopened hearings commenced on August 5, 1959 [R. 50]. At that time, an additional charge of deportability was lodged by the Service, to wit, deportability by reason of excludability at time of August, 1956 re-entry as an alien "afflicted with psychopathic personality" [R. 52-54]. This charge was based upon a medical examination requested by the Service in the interim period between the issuance of the initial deportation order and the hearing on the motion to re-

open, to wit, on June 18, 1959. A. R. Dahlgren, a senior surgeon for the United States Public Health Service gave respondent a physical examination and reviewed his history in "an hour, plus or minus" [R. 62]. He then classified respondent as a "Class A Psychopathic Personality" [R. 71], basing his evaluation on "The history and the documentation of the, shall we say, arrest" [R. 63], rather than on any information gleaned from the physical examination [R. 64]. He also drew from this the conclusion that the condition existed prior to and at the time of the August, 1956 re-entry. A sworn statement by respondent to an investigator of the Immigration and Naturalization Service taken on March 25, 1959, in Ventura, California, concerning a history of his youthful activities was submitted by the Service at this time [R. 74-75].

Respondent had been undergoing psychiatric care and treatment during this period. In defense of this new charge correspondence from the treating psychiatrist, Dr. David R. M. Harvey, was submitted at the reopened hearing. In substance it stated that respondent is not, and was not, a sexual psychopath, and that sexual drive is thought to be within his range of control. The latter further stated that "In many ways he seems to have traits of a better than average citizen, in the sense of hard work, general morality, and honesty" [R. 6-8].

On September 22, 1959, an order of deportation was issued after a hearing before the Immigration Service's special inquiry officer in Los Angeles, California, or-

dering respondent to be deported from the United States pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act, 8 U. S. C. 1251(a)(1), 66 Stat. 204, on the ground that respondent was subject to exclusion at the time of his 1956 re-entry for the alleged reason that he was within one or more of the classes of aliens afflicted with "psychopathic personality" under Section 212(a)(4) of the Immigration and Nationality Act, 8 U. S. C. 1182(a)(4), 66 Stat. 182 [R. 84-86].

The findings and order of deportation was appealed to the Board of Immigration Appeals and said Board dismissed respondent's appeal on November 20, 1959 [R. 86-90]. Thereafter, the present action was commenced on behalf of respondent on December 9, 1959, in the United States District Court, Southern District of California, Central Division, for declaratory and injunctive relief from deportation [R. 3-10]. The matter was heard by a single district court judge, who granted the petitioner's motion for a summary judgment on January 4, 1961 [R. 19-21].

On April 17, 1962, the Court of Appeals for the Ninth Circuit set aside the deportation and enjoined its enforcement [R. 100-101]. The appeal here was based on two contentions, namely, (1) that the deportation order was based upon inadequate evidence, and (2) that Section 212(a)(4) of the Immigration and Nationality Act violates the due process clause of the Fifth Amendment of the Constitution in that the term

"psychopathic personality" is vague, ambiguous and deprives respondent his right of liberty without fair notice of practices to be avoided. The court, however, proceeded to consider the constitutional question since it concluded, any evidentiary consideration is predicated on the validity of the applicable statute [R. 94]. The court noted that although the void for vagueness principle is generally applied with respect to criminal statutes [R. 94], yet its application has been extended to civil proceedings and particularly invoked in one instance to a statute ordering the deportation of resident alien. *Jordan v. DeGeorge*, 341 U. S. 223 (1951).

That deportation was ordered on the apparent ground that at the time of his 1956 re-entry, respondent was excludable, rather than on any act committed by respondent after such re-entry, was clearly recognized by the court. However, to arrive at its conclusion that respondent was a psychopathic personality at the time of re-entry, the Service relied upon evidence of respondent's post-entry behavior, *i.e.*, his behavior during the period after his initial 1952 and after 1956 re-entry. The record indicates that during this period respondent's homosexual proclivities were not compulsive, but a matter of choice [R. 96], therefore he could have avoided such practices if adequately forewarned.

Having determined, for the foregoing reasons, that this is a proper case for the application of the void-for-vagueness principle, the court stated that the term "psychopathic personality" must be read without refer-

ence to its legislative history; it concluded that the term when "measured by common understanding and practices" did "not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein" [R. 100]. Therefore the applicable statute failed to advise him that homosexual practices conclusively evidence a "psychopathic personality" (which conclusive presumption can only be gleaned from legislative history, since medical science has questioned the use of this term). Thus, the statute failed to notify him that unless he refrained from such conduct, harsh results might follow. In substance then, the application of this statute imposes a sanction upon voluntary behavior of respondent while a lawful resident of the United States, without a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Accordingly, the statute is void for vagueness and enforcement of the deportation order would deprive respondent of due process of law. Moreover, the court concluded, "it is a matter of speculation" whether the Service examiner might have entered a finding of "psychopathic personality" in 1959 based on "pre-entry conduct prior to October 9, 1952, or whether on such facts a charge would even have been brought. . . ." [R. 96].

ARGUMENT.

The Court of Appeals Correctly Applied the Void-for-Vagueness Principle to the Deportation Proceedings in This Case.

A. The Constitutional Requirement of Fair Warning Is Applicable to the Instant Situation, Since Section 212-(a)(4) as Applied Herein Acts, in Substance, to Impose a Sanction on Conduct, Although on Its Face the Statute Seems to Merely Prescribe Standards for Admission of Aliens.

The anti-vagueness prescription has been explained as a constitutional mandate that:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the states commands or forbids." *Lanzetta v. State of New Jersey*, 306 U. S. 451, 453 (1939).

This is only a logical correlative to the fundamental concept of justice and ordered liberty embodied in our Constitution since:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. . . ." *Connally v. General Contr. Co.*, 269 U.S. 385, 391 (1926).

Although this rule ordinarily applies to criminal laws where its "essential purpose is . . . to warn individuals of the criminal consequences of their conduct" it was nevertheless applied to Section 241(a)(4) of

the Imigration and Nationality Act which provided for the expulsion of an alien from the United States for the commission of two crimes involving "moral turpitude" at any time after entry; the court so applied this constitutional principle to an expulsion situation in view of the "grave nature of deportation." *Jordan v. DeGeorge*, 341 U. S. 223 at 231 (1951). Chief Justice Vinson, speaking for the court, maintained that there is only a verbal distinction between expulsion laws and criminal statutes emphasizing that although "this statute does not declare certain conduct to be criminal" the void-for-vagueness principle is applicable since "[The statute's] . . . function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite two crimes." *Jordan v. DeGeorge, supra*, 230.

Moreover, the applicability of the void-for-vagueness principle to statutes involving can be seen from another perspective, to wit, its similarity to punishment for criminal behavior.

> "It is the forfeiture for misconduct of a resident in this country. Such a forfeiture is a penalty." *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948).

Also see: *Klonis v. Davis*, 13 F. 2d 630 (2d Cir. 1926); Konitz, *Civil Rights in Immigration*, Ch. 2 (1953); *Whom Shall We Welcome* 200-203; Bullitt, *Deportation as a Denial of Substantive Due Process*, 28 Wash. L. Rev. 205 (1953); Note, 37 Minn. L. Rev. 440, 456-458 (1953) (grounds for deportation "read . . . like a penal code"); Comment, *Limitations on Congressional Power to Deport Resident Aliens Excludable as Psychopaths at Time of Entry*, 68 Harv. L. Rev. 931.

The affinity of this sanction to a criminal penalty and the corresponding need to impose constitutional safeguards has been further elucidated by this court in *Bridges v. Wixon*, 326 U. S. 135 (1945) where the Court, *per* Justice Douglas, expressed in part that (154):

> "Though deportation is not technically a criminal proceeding it visits a great hardship on the individual and deprives him of the rights to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness."

Again, re-emphasizing the seriousness of deportation, Justice Murphy in his concurring opinion expressed at page 163 that:

> "It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a 'crime'. Those are over subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends, and his livelihood forever. Returning to his native land may result in poverty, persecutions and even death. There is thus no justificable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation."

However, petitioner contends that the void-for-vagueness doctrine is not applicable to a statute such as Section 212(a)(4) of the Immigration and Nationality Act which purports to merely prescribe standards for admission of aliens, not proscribe and impose sanctions on their conduct while in the United States. Concededly, this is the purpose of Section 212(a)(4) when applied to an alien knocking at our gates for permission to enter. Yet, this purpose is distorted when this statute is coupled with the so-called "re-entry doctrine" which regards a return re-entry as an "entry" into the United States for immigration purposes. Section 101(a)(13) of Act, 66 Stat. 167, 8 U. S. C. 1101(a)(13). An alien requesting re-entry may thus be excludable for an act committed while a resident of the United States if he fits a category of excludability by reason of that act. The inequity of this result is further compounded carrying the re-entry doctrine over into the deportation field through Section 241(a)(1) of the same Act which permits one to be deported who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of entry."[2] This

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[2]A vivid illustration of this inequity is *Lurbrich v. Woodhead*, 90 F. 2d 991 (5th Cir. 1937). (Mrs. Woodhead, a lawful resident of the United States for 10 years, left this country for a two hour shopping tour to Canada. Two months later she was admitted to a hospital as a tubercular patient. Immigration authorities then brought deportation proceedings against her as an alien who, before re-entry, had tuberculosis and was likely to become a public charge. (66 Stat. 163, Section 212(a)(b), 8 U. S. C. 1182(a)(b) (1952).). The court of appeals in affirming the deportation order stated:

> "Once more we are impelled to direct attention to the toil in human anguish which so often follows that literal reading of the Immigration Act by which every departure from the United States, however, brief, and temporary, and pursuant

combination enables the Service to utilize evidence to acts committed while a lawful resident of the United States to create presumption of pre-reentry characteristics rendering him excludable at the time of re-entry;[3] in effect equating post-entry behavior with a pre-entry condition and imposing the sanction of deportation under the guise of initial excludability. This is indeed a perverted application of the doctrine and contrary to our basic concept of fair play.[4] The incongrous extremes of such a doctrine is personified in a case reported in the *New York Times*, April 12,

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to no intention to relinquish domicile, constitutes subsequent return a new entry, subjecting the unsuspecting to exclusion or deportation."

[3]This doctrine has prompted one writer to express that:

"Acceptance of the idea that power to expel is ordinarily limited to ejection based on proved or reasonably presumed pre-entry characteristics would have the merit of enabling courts to escape the paradoxical position of eloquently recognizing that *banishment is in fact punishment.*" (Emphasis ours.) Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 69 Yale L. Journ. 262, 291 (1959).

[4]Speaking of the exclusion statutes, the President's Commission stated:

"The grounds for such exclusion in the immigration laws were designed to bar newcomers whose entry would be harmful to the United States. Aliens who are admitted lawfully are permitted to remain unless an offense committed in the United States renders them deportable. The Commission cannot find reasonable justification to the use of immigration laws to entrap residents of the United States who were not amenable to deportation so long as they continued to be physically in the United States, but who happened briefly to cross the international boundary lines. WHOM SHALL WE WELCOME, Rep. Pres. Commissioner on Immigration and Naturalization, pt. XV, at pages 179, 180 (1953); the courts in *Schoeps v. Carmichael*, 177 F. 2d 391 (9th Cir. 1949) inquired: No obvious answer occurs to the query of how a man can make a re-entry as an alien from a foreign country, on which he has causally set foot, into a country in which he has already been permanently domiciled for more than twenty years."

1954, p. 5, col. 2. One Samuel Jones, age 72, a Detroit Pensioner, came to this country in 1922. Shortly after his arrival, he was convicted of simple larceny and fined fifteen dollars for stealing a newspaper. He explained that he had forgotten to drop pennies into the coin box because he grabbed the paper while running to catch a streetcar. Later, Mr. Jones visited Canada for two weeks and upon returning forgot to tell immigration officials about the old conviction then in 1954, thirty years after the conviction, he faced deportation on the ground that he violated the admission laws by concealing a conviction which occurred before entry.[5] Surely, this can be

[5]Case was noted in: Hofstein, The Returning Resident, 10 Intramural L. Rev. of N. Y. U. 271.

In light of rigid and often harsh results that befall the resident alien, respondent urges that the application of the "re-entry doctrine" be re-evaluated. The doctrine enables the Immigration and Naturalization Service to expel an alien for acts or conditions which do not necessarily render him deportable or ineligible for American citizenship. *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953). If the resident alien leaves the country for a brief visit to a neighboring country then he may, with the law being applied as in the past, upon his return, be excluded or deported on grounds which would not be sufficient if he has remained at home. Does this procedure satisfy the high standards of fairness and justice which this Court has consistently applied? "Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U. S. 135 (1945).

To the arriving alien the term "entry" means the original admission to the United States, the time when one first sees the Statue of Liberty or the Golden Gate Bridge; the time when a refugee finds a renewed hope for a better life. Scarcely would one guess that an entry after a train ride through a part of Canada, *Di Pasquale v. Karnuth*, 158 F. 2d 878 (2d Cir. 1947); an unexpected docking at a foreign port during a fishing trip, *Pincys v. Savoretti*, 214 F. 2d 314 (5th Cir. 1945); an unscheduled stop at Victoria, British Columbia, *Yukio Chui v. Bonham*, 165 F. 2d 207 (9th Cir. 1947); or when one's ship is torpedoed and one is rescued and taken to Cuba, *Delgadillo v. Carmichael*, 332 U. S. 388 (1947), would be regarded as an original entry.

nothing more than cruel and abusive punishment for a petty offense.

In the instant case, petitioner points out that on its face the statute does not purport to impose sanction or conduct. This cannot be disputed, but by carrying the re-entry doctrine over into the area of deportation in an attempt to give effect to the statute in the instant case, petitioner has ceased to use the statute as a standard for determining admissability of aliens. The court of appeals was quick to recognize this fact.

Although this Court has in some cases supported this doctrine, *Claussen v. Day*, 279 U. S. 398 (1929), *United States ex rel. Volpe v. Smith*, 289 U. S. 422 (1932), in view of the courts struggles with this concept and the stretching and pulling to avoid an unnecessarily harsh result *Di Pasquale v. Karnuth*, *supra*, *McLeod v. Peterson*, 283 F. 2d 180 (3rd Cir. 1960), we request this Court to re-evaluate the constitutionality of this doctrine which, by reason of its extraordinary usage fails to provide a lawful resident of its impact. "It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards." Judge Learned Hand, *Di Pasquale v. Karnuth*, *supra*. "Entry is the date and place of first admission to the United States as a permanent resident; this is the entry referred to when he fills out his yearly address report card (form I-53, Immigration and Naturalization Service) as required by the Immigration and Nationality Act, Section 265, 8 U. S. C. 1305." The present technical usage applied by the Service, however, is a far cry from "common understanding and practice" *Jordan v. De George*, 341 U. S. 223 (1951), nor do persons of common intelligence so apply the term. *United States v. Harriss*, 347 U. S. 612 (1954).

The original intent of the Service in stating the grounds for exclusion were to "bar newcomers whose entry would be harmful to the United States." *Whom Shall We Welcome*, Report of the President's Commission on Immigration and Naturalization; 1953. The Commission could not find any reasonable justification for the use of the re-entry doctrine to "entrap residents," speaking in this regard, they specifically recommended:— "The Commission recommends that the provisions directing the exclusion of aliens shall not be applicable to aliens who have established lawful permanent residence in the United States and who are returning from a brief absence." (Page 179 of the Report.) They concluded that the brief absence should not create the basis

Although the deportation order is not apparently based on respondent's records of arrests and convictions, petitioner relied on such records to conclude that respondent was a psychopathic personality at the time of the August 1956 re-entry. By carrying the re-entry doctrine over into the deportation statutes, petitioner asserts the alien presently deportable.[6] This is essentially telling respondent that he is presently deportable (or more appropriately punishable) because these convictions indicate that he is a psychopathic personality.[7] The degree of reliance on these post

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for exclusion if the resident aliens were not otherwise subject to deportation. See, also, Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 Colo. L. Rev. 309 (1956).

> "The stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme." *Delgadillo v. Carmichael, supra*, at page 391.

[6]Deportation could not possibly have been considered based on respondent's original entry on October 9, 1952, as the effective date of the statute under which deportation was ordered took effect on December 24, 1952 (Sec. 407, 66 Stat. 281). By use of the re-entry doctrine however, the entry date is said to be moved up to the date of re-entry, *i.e.*, August, 1956.

[7]One writer recognized this abusive application of the Act several years ago expressing that:

> "The McCarren Immigration Act's provision for the deportation of aliens who were excludable at time of entry as 'persons afflicted with psychopathic personality' permits administrative expulsions under an indefinite standard to which the courts have added scant precision. As a result, unpredictable and large uncontrolled deportations occur at the order of immigration hearing officers. While treating expulsion as an exercise of the generally unreviewable power of Congress over foreign relations, . . . courts acknowledge that deportation proceedings constitute governmental action within the territorial boundaries of the United States and are therefore not exempt for constitutional requirements. *Bridges v. Wixon*, 326 U. S. 135 (1945) . . . *Japanese Immigrant Case*, 189 U. S. 86 (1903) . . . *Yick Wo v. Hopkins*, 118 U. S. 356 (1886)." Comment, 68 Yale L. Journ. 931.

entry acts for the conclusion that respondent was a psychopathic personality at time of re-entry is readily ascertainable from the testimony of the doctor from the United States Public Service who so classified him. Dr. Dahlgren based his conclusions on "the history and documentation of the . . . arrest" [R. 63] and not on a physical examination of respondent [R. 64]. It is submitted, and this is the position of the Court of Appeals, that whether such a determination would have been arrived as absent evidence of post-entry behavior is purely a matter of speculation [R. 96]. Clearly then, the application of the constitutional void-for-vagueness test to this particular situation conforms to the fundamental spirit of this principle.[8]

Moreover, if any doubts remain, the federal courts have tended to construe such doubts involved in a deportation situation in favor of the alien and against deportation. *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948); *Gubbels v. Hoy*, 261 F. 2d 952 (9th Cir. 1958).

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[8] *Ibid* at pp. 942-943: The vague language of the "psychopaths" clause impinges upon the due process requirement that a penal provision must forewarn potential offenders by specifically escribing what conduct will result in punishment. (*Musser v. Utah*, 333 U. S. 95, 97 (1948). "Legislature may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding . . ." *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939). "All are entitled to be informed as to what the state commands or forbids").

"In effect, this amounted to a claim that whenever Congress found the conduct of certain classes of alien undesirable, it could equate undesirability with proof of initial excludability and therefore apply expulsion provisions unlimited in times." Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 69 Yale L. Journ. 262 (1959).

B. The Application of the Void-for-Vagueness Due Process Principle in the Instant Situation Is Not Inconsistent With, But Rather, a Reaffirmation of the Assertions of This Court With Regard to the Due Process Rights of Lawful Resident Aliens.

In harmony with our basic concepts of justice and fairness, this Court was early to recognize the extension of the constitutional guarantees to lawful resident aliens. The court in *Lem Moon Sing v. United States*, 158 U. S. 538 (1895) elucidated this right *per* Justice Harlan at page 547 as follows:

> "While he [the alien] lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights, when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States."

To so encompass the resident alien with our Constitutional safeguards is only commensurate with the fact that we have chosen to permit him to remain indefinitely in our country and become an active and useful member of our society.[9] Neither did the en-

[9] "We have an obligation to treat such resident aliens on a level of justice close to that dispersed to citizens because, among other reasons, instead of requiring him to become naturalized if he intends to settle here, we have chosen to permit him to remain indefinitely and to become a full-fledged member of the community in which he lives: to be employed, to marry and raise a family; to pay taxes, to serve in the Armed Forces, and otherwise to participate in all activities save those reserved for citizens such as voting." WHOM SHALL WE WELCOME, Rpt. of the President's Comm'n. on Immigration and Naturalization 193 (1953). Also see Bullitt, *Deportation as a Denial of Substantive Due Process*, 28 Wash. L. Rev. 205.

lightened framers of the Constitution intend to exclude the resident aliens from this protectional purview, as the term "person" in the Fifth Amendment is sufficiently broad to include every person lawfully within United States, citizen or non-citizen. See *Yick Wo v. Hopkins,* 118 U. S. 356; *Wong Wing v. United States,* 163 U. S. 228; *Carlisle v. United States,* 16 Wall. 147.

An alien's rights may vestly differ depending on whether he is outside the United States awaiting admittance or has assimilated himself as a lawful resident into the population within our country. *The Japanese Immigrant Case,* 189 U. S. 86 (1903); *Johnson v. Eizentrager,* 339 U. S. 763 (1950); *Wong Yang Sung v. McGrath,* 339 U. S. 33 (1950); *Shaughnessy v. United States ex rel. Mezei,* 345 U. S. 206 (1953). On opposite ends of the spectrum we have the plenary power of Congress to exclude aliens altogether from entering the United States, or to prescribe the terms and conditions of their entry *vis-a-vis* the guarantee of Constitutional due process to persons residing in this country. Petitioner seems to assume in all cases involving aliens the first power is either inconsistent with or totally overrides considerations for the latter.[10] In support, cases are cited which purport

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[10]This constitutionally untenable position may be explained by the following comment:

> "The susceptibility of immigration to a classification blurred between the 'legislative' and the constitutional should not be surprising in view of the anatomy of the field; it is composed of two basic issues—political control over the borders, and constitutional due process—each of which, if taken, separately, would lead to opposite conclusions. Thus, if the claimants were not aliens and if they were claiming something other than authorization to enter or remain in this country, their case would involve simply questions of per-

to involve enforcement of statutory grounds for deportation retroactively enacted. Yet, it is noticed that Justice Jackson, the exponent for the majority in *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952), the leading case cited by petitioners, strongly dissented in *Jordan v. DeGeorge*, 341 U. S. 223 (1951). In *Jordan* this Court applied the void-for-vagueness test to the term "crime involving moral turpitude" to a statute making deportability turn on post-entry conduct. The Majority found the term not unconstitutionally vague because of its deep-rooted use. The Dissent questioned whether these terms could provide a sufficiently clear standard even for courts and administrative officials. Petitioner, however, contends the dissent was only concerned with a certain type of statutory vagueness in deportation statutes, *i.e.*, uncertainty for judicial and administrative purposes. But isn't the dissents expression merely exaggerated recognition of the constitutionally infirm nature of the statute? Scarcely could the language of a criminal-type statute be fair warning to an individual if it is no help as a guide to the courts. One writer approached this problem from a different perspective:

> "As a practical matter a statute apprising the individual can be made to apprise the court and jury. It does not seem likely that a court will be unable to make a determination the individual can make. Therefore, *the important function* in the requirement of definiteness of a criminal statute

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sonal liberty and would admittedly be conducted according to constitutional standards of due process. *Ng Fung Ho v. White*, 259 U. S. 276 (1921)." Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Court*, 71 Yale L. Journ. 760 (1962).

is to give notice to the individual."[11] (Emphasis added).

Furthermore, Justice Murphy in *Bridges v. Wixon*, 326 U. S. 135 (1945) [concurring opinion] undertook to clarify the constitutional status of the resident alien with respect to the power of Congress over deportation when he expounded, in part, the following (at pp. 161-162):

> "This assumption underlying the statute is that the 'plenary' power of Congress to deport resident aliens is unaffected by the guarantee of substantive freedoms contained in the Bill of Rights. In other words, as the government has urged before us, the deportation power of Congress 'is unaffected by considerations which in other contexts might justify the striking sown of legislation as an abridgment of constitutionally guaranteed rights of free speech and association'. From this premise it follows that Congress may constitutionally deport aliens for whatever reasons it may choose, limited only by the due process requirements of a fair hearing. The color of their skin, their racial background or their religious faith may conceivably be used as the basis for their banishment. An alien who merely writes or utters a statement critical of the government . . . may be subjected to the legislative whim of deportation.
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> I am unable to believe that the Constitution sanctions that assumption or the consequences that logically and inevitably flow from its application. The power to exclude and deport aliens is one

[11]Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 Vand. L. Rev. 531 at 541-542.

springing out of the inherent sovereignty of the United States. *The Chinese Exclusion* case, 130 U. S. 581, 9 S. Ct. 623. . . . Since an alien clearly brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit. . . . But once an alien lawfully enters and resides in this country he comes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendment and the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to 'all persons' and guard against any encroachment on those rights by federal or state authority. . . .

Since resident aliens have constitutional rights it follows that Congress may not ignore them in the exercise of its 'plenary' power of deportation. As this Court said in a previous exclusion case, 'But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provision of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in the 'due process of law' as understood at the time of the adoption of the Constitution. *The Japanese Immigrant Case* . . . 189 U. S. 86, 100, 23 S.Ct. 611, 614, 47 L.Ed. 721. *No less may a statute on its face disregard the basic freedoms that the Constitution guarantees to resident aliens.* The Chief Justice, in his dissenting opinion in

Jones v. Opelika, 316 U.S. 584, 609, 62 S.Ct. 1231, 1245 . . . has stated that 'the First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws'. By the same token, the First Amendment and other portions of the Bill of Rights makes no exception in favor of deportation laws or laws enacted pursuant to a 'plenary' power of the Government. . . . (Emphasis Added).

Any other conclusion would make our constitutional safeguards transitory and discriminatory in nature. . . . The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him. I cannot agree that the framers of the Constitution meant to make such an empty mockery of human freedom.

Since the basic assumption of the statute is false, the Bill of Rights must be brought to bear. And when that is done several constitutional infirmities are apparent in this legislation. . . ."

In *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953) this Court was confronted with the question whether an alien who was a resident of long standing in this country, but had departed as a seaman on an American vessel was entitled to constitutional rights of due process upon re-entry. This court *per* Justice Burton repeated the fact that:

"It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person with-

in the protection of the Fifth Amendment. He may not be deprived of his life, liberty, or property without due process of law." [Cases cited: *Bridges v. Wixon*, 326 U. S. 135 (1945); *Johnson v. Eisentrager*, 339 U. S. 763 (1950); *The Japanese Immigrant Case*, 189 U. S. 86 (1903)].

The relative nature of the re-entry doctrine was then pointed out, indicating that the application of the re-entry doctrine to the returning resident by the Service does not preclude consideration of the alien's constitutional rights. In other words, the immigration purposes of the re-entry rule are not determinative of the alien's constitutional rights, rather:

> "For purposes of his constitutional right of due process, we assimilate petitioner's status to that of an alien continuously residing and physically present in the United States . . . [since] he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien. . . ."

Similarly, even though re-entry entails the same requirements as entry for immigration purposes, it does not follow that respondent's constitutional rights to due process acquired during his period as a resident alien were "washed out" by a few hours in Mexico, as the court of appeals was quick to note [R. 97]. Accordingly, the application of the void-for-vagueness test to the instant situation corresponds with the affirmations of this court; neither is such an application inconsistent with nor abrogative of the powers of Congress to regulate immigration.

C. The Application of Section 212(a)(4), to the Instant Situation Would Violate Respondent's Right to Due Process of Law in That the Term "Psychopathic Personality" Is so Vague and Indefinite as to Impose a Sanction Without Fair Notice of the Practices to Be Avoided.

Petitioner does not seem to quarrel with the fact that the term "psychopathic personality" is vague and indefinite. Indeed, a brief recapitulation of the opinion of the Court of Appeals and the authorities cited therein clearly reveals this uncertainty:

(1) Dr. A. R. Dahlgren, the United States Public Health Service surgeon certified respondent as a "Class A psychopathic personality" because "by the instructions which I must follow, I have to place these deviates in this category. . . ." [R. 98]; he further testified: "We have to use certain terminology—and the rest of the world may not agree with this terminology: we are so ordered, therefore we do. . . ." [R. 65; 98, n. 13].

(2) Dr. David R. Harvey, respondent's attending psychiatrist, was of the opinion that respondent's deviation is not sufficient to justify the diagnosis of "psychopathic personality", but rather, the formal label should be "sexual deviation, homosexuality, now under control." [R. 98, n. 8.] The court below noted that "It is not established that Dr. Dahlgren would have differed with Dr. Harvey, if he had felt free to express his own opinion as to the term, rather than feeling obliged to apply the Public Health Service definition." [R. 99, n. 16].

(3) The Public Health Service in its report to the House of Representatives admitted that "although the term 'psychopathic personality' is vague and indefinite

no more appropriate expression can be suggested at this time (Report of the Public Health Service on the Medical Aspects of H. R. 2379 in H. R. Rep. No. 1365, 82nd Congress, 2nd Session 46-47 (1952)).

(4) The vagueness of the term is confirmed by authoritative medical experts in this field. Some of these are: Noyes, *Modern Clinical Psychiatry*, 3rd ed. 1941, 410: "psychopathic personality" . . . is considered by many to be a meaningless designation. . . . not yet is there any common agreement . . . as to classification . . . or etiology; Guttmacher, "Diagnosis and Etiology of Psychopathic Personalities as perceived in Our Time", in *Current Problems in Psychiatric Diagnosis* (Hoch & Zubin, ed. 1953), 139, 154: "At present, the diagnosis of a psychopathic personality is practically meaningless." [R. 99-100, n. 19].

These are just a few of the factors that led the Court of Appeals to state: "The conclusion is inescapable that the statutory term 'psychopathic personality', when measured by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein". [R. 100].

Petitioner contends, however, that because the statute in question merely prescribes requisite standards for admission and because "Congress may retroactively . . . make even post-entry conduct grounds for revocation of its permission for an alien to remain in the United States," respondent is not entitled as a matter of right to any notice. Such a broad generalization disregards the implicit holding in *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953), that the Immigration Act may not arbitrarily be applied so as to convert a law-

ful permanent resident into an entering alien, and thereby take away his constitutional rights.

Moreover, petitioner subsequently seems to concede that respondent may be entitled to warning, but to something less than fair. Whatever the standard promulgated, it is asserted that looking at legislative history to give *meaning* to the statute supports an otherwise constitutionally deficient application of a deportation statute.

Now since the void-for-vagueness doctrine is designed to protect against unforeseeable imposition of sanctions, it follows that its production is properly available only to those who are capable of choosing between compliance and non-compliance. The court of appeals recognized that "Insofar as the record reveals, continuance of homosexual practices after Fleuti entered this country in 1952, and again in 1956, was not compulsive, but a matter of choice" [R. 96], therefore he should be entitled to forewarning of the serious criminal-type sanction that may be imposed by reason of his conduct while a resident of this country.

The question remains—what constitutes fair warning in this instance? It was noted by the court below that although subsequent judicial construction may make otherwise vague language sufficiently definitive; "at the time this post-entry conduct occurred, there was no decisional law as to the meaning of the term as used in this or any other federal statute." [R. 97-98; n. 12 on p. 98]. But petitioner contends that since only the rights of an alien are involved any clarification of the statute from legislative history is sufficient. This would seem contrary to prior pronouncements of this Court; neither has this Court seen fit in the past to

set up separate standards of due process. In *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939) it was stated that:

> "If on its fact the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it . . . No one may be required, at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Again, this Court in *United States v. Harriss*, 347 U. S. 612, 617 (1954), expressed:

> "Our review under the Criminal Appeals Act is limited to a decision on the alleged 'invalidity' of the statute on which the information is based. In making this decision, *we judge the statute on its face.*" (Emphasis added).

Also see: *United States v. Spector*, 343 U. S. 169, 171 (1952). The Court did, however, refer to the legislative history of the Act, but limiting its reference to ascertaining whether a reasonable construction may be made of the alleged vague language which would preserve one of the purposes of the Act. The Act, ultimately, was narrowly construed so as to avoid any "constitutional doubts".

In the instant case, although the legislative history may be of assistance to the Service in processing admission application, as applied to respondent it "forbids . . . an act in terms so vague that men of common intelligence must necessarily guess at its meaning and application . . . [therefore] it fails to meet the standards required by due process of law." *Connally v. General Construction Co.*, 269 U. S. 385, 391 (1926).

Conclusion.

Petitioner's main contention is that Section 212(a)(4) of the 1952 Immigration and Nationality Act merely prescribes standards for the admission of aliens, therefore the constitutional requirement of fair warning is not applicable. It is submitted, however, that this constitutional principle is correctly applied to the instant situation by reason of the resultant effect of the conjunctive use of various immigration acts by petitioner to render respondent deportable. Respondent is to be deported because of an alleged condition, to wit, psychopathic personality, which existed at time of the 1956 re-entry. The finding of this condition was based primarily on his post-entry or bad conduct while a resident of this country. Respondent, a lawful resident, had no fair warning that this conduct might involve such a serious penalty as deportation. It would scarcely be consonant with our concept of ordered liberty to permit such a devious application of the immigration statutes to impose a sanction in an instance where the statutory language is otherwise constitutionally void-for-vagueness.

Dated: February 27, 1963.

Respectfully submitted,

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